

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.

)

Docket No. ER04-776-000

**PROTEST OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("FERC or Commission") Rules of Practice and Procedure, 18 C.F.R. §385.211, the Illinois Commerce Commission ("ICC") hereby submits its Protest of the filing submitted by PJM Interconnection, Inc. ("PJM") ("April 29 Filing") on April 29, 2004, in the above-captioned proceeding. PJM's April 29 filing consists of proposed revisions to the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. ("Operating Agreement") primarily to add Section 18.17.4 (Disclosure to Authorized Persons), a Form of Non-Disclosure Agreement (Schedule 10), and a Form of Certification (Schedule 10A).

I. BACKGROUND

On August 28, 2003, the Commission held a Standard Market Design Technical Conference in Wilmington, Delaware. During the conference, a number of state commissions expressed concern that they lacked necessary access to confidential RTO data and information collected by both PJM and the PJM market monitor. This was a major topic of discussion. Indeed, ICC Commissioner Kevin Wright's presentation focused on that issue. After the discussion, Chairman Wood and Commissioner Brownell recognized the concerns of the states and directed PJM to initiate a process to include appropriate representatives of the state

commissions and other stakeholders in order to work toward resolving the issues surrounding state regulator access to confidential PJM information.

PJM initiated such a process, and the ICC began as a participant. However, as the process proceeded, it became clear to the ICC representatives that the interests of some state commissions were not being properly addressed. PJM's April 29 filing is the result of the process initiated by PJM, but the contents of that filing have not been agreed to by all of the state commissions—and, in particular, they have not been agreed to by the ICC.

On May 5, 2004, the Commission noticed PJM's April 29 filing and set May 20, 2004 as the deadline for comments or protests. On May 13, 2004, the ICC submitted its Notice of Intervention and a Motion for Extension of Time to file this Protest. On May 17, 2003, FERC issued a notice of extension of time, extending the comment deadline to May 26, 2004.

II. ICC POSITION

The ICC welcomes and appreciates the Commission's efforts to assist the state commissions in obtaining access to certain market-sensitive confidential information necessary to carry out responsibilities at the state level. The ICC fully supported the process recommended by Commissioner Brownell and had representatives to participate in the PJM working group process established last fall, including Commissioner Wright. That is why it is troubling that the ICC is now forced to enter this protest against the PJM recommendations contained in the April 29 filing. We believe that the documents PJM is proposing would establish an unrealistic process and would place an oppressive burden on the states, hindering the ICC's ability to carry out responsibilities under state law.

The Illinois Public Utilities Act charges the ICC with regulating public utilities in the State of Illinois.¹ As part of its regulatory duty, the ICC is required to ascertain that Illinois public utility rates, charges, and rules and regulations relating to rates and charges for retail service within Illinois are just, reasonable and non-discriminatory.² The Illinois General Assembly has also directed the ICC to “act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers.”³ The Illinois General Assembly recognized the relationship between the retail and wholesale markets and required the ICC to advocate the development of competition in the wholesale, as well as the retail, market.

By moving away from the traditional regulated public utility model and embracing competition as the principal mechanism to protect retail customer interests, the Illinois General Assembly has made Illinois fully subject to the regional nature of electricity markets and transmission operations. While PJM will provide regional transmission service and operate regional electricity markets, the Illinois legislature continues to look to the ICC to protect retail ratepayers in Illinois. Without access to complete system and market data from across the Midwest electric market region (of which Illinois will be a major part), the ICC’s ability to monitor, mitigate and prevent the exercise of market power imposed on Illinois electric consumers and ensure reliable system operations and efficient planning would be severely hobbled. Indeed, without such information, the ICC would be effectively unable to carry out the directives of the Illinois General Assembly in the ways envisioned by that body. Accordingly, if the ICC is prevented from accessing necessary regional information (including PJM

¹ 220 ILCS §5/1-101, *et seq.* (2000 & Supp. 2001).

² *Id.*, at §§5/9-101 - 5/9-252.

³ *Id.*, at §5/16-101A(d).

information), it may become necessary for the ICC to advise the Illinois General Assembly about additional needed changes to the electricity regulation statutes in Illinois.

With these obligations and concerns in mind, the ICC has reviewed PJM's April 29 filing and identified provisions in the proposed Operating Agreement revisions, the proposed Form of Non-Disclosure Agreement ('NDA'), and Form of Certification that, if accepted by the Commission as proposed by PJM, would effectively hamper the ICC's ability to fully satisfy its statutory obligations. These provisions are discussed in greater detail in the following section of these comments and, where appropriate, the ICC has proposed alternative language for the Commission's consideration that would effectively resolve the ICC's concerns. Accordingly, the ICC makes the following recommendations for the Commission's consideration.

III. ICC RECOMMENDATIONS

The ICC recognizes that the documents that PJM submitted to the Commission on April 29, 2004, were developed using a form of PJM's stakeholder process. The ICC would like to be in a position to support the output of that PJM stakeholder process and to support the documents that PJM filed on April 29. Unfortunately, those documents fail to take into account the ICC's statutory obligations and fail to accommodate the ICC's critical needs.

The ICC, through its representatives, attempted to make its critical needs known through the stakeholder process used by PJM to assist it in developing the documents filed by PJM on April 29. However, the ICC strongly disagrees with PJM's characterization in its Filing Letter in this docket that the principles upon which the documents in this case were developed were "agreed upon" by the ICC.⁴ No such agreement was entered into by the ICC and no such representation was ever conveyed by the ICC's representatives. In these Comments, the ICC has

⁴ PJM Filing Letter at 3.

attempted to be very detailed in explaining its objections and in specifying modifications that are needed to the documents filed by PJM in order for the ICC to fulfill its statutory obligations.

As an initial matter, PJM's proposed documents are excessively constraining, complicated, and duplicative. The documents place an overwhelmingly excessive burden on the states, requiring more red tape than either the ICC or the Commission as government entities could manage on the best (or worst) of days.

As an alternative to PJM's proposal for authorizing access to confidential RTO information, the ICC commends the more reasonable approach proposed by the Midwest ISO in Section 38.9.4 of its Energy Markets Tariff filed on March 30, 2004 in Docket ER04-691-000. PJM's approach would place new liabilities and burdens on the states and their representatives contained in the three proposed additional formal agreements attached to PJM's Operating Agreement. By contrast, the Midwest ISO's approach to granting state regulator access to confidential RTO information would be accomplished simply by adding one paragraph to the Midwest ISO's tariff. It is the ICC's position that the Midwest ISO's approach to resolving the issue of information access constitutes the proper template to which PJM's proposal should be compared.

If the ICC's opposition to PJM's filing were merely a matter of style and process, we would not bother to bring these matters to the Commission's attention. However, our opposition to PJM's filing involves threshold legal issues and substantive policy matters that must be resolved by the Commission so that cooperative federalism over the new regional electricity markets and newly regionalized transmission operations and planning can work. Acceptance by the Commission of PJM's April 29 proposal controlling access by state regulators to confidential PJM information would effectively eliminate the framework for that cooperation.

The ICC's objections to PJM's April 29 proposal are nearly too numerous to mention as illustrated by the unusual length of this Protest. All of these individual objections are important. However, some of the major areas of the ICC's opposition to the documents proposed by PJM are:

- (1) PJM's proposal in Section 18.17.4(a)(ii) of the Operating Agreement revisions which would make the ICC's authority subject to an Order of the FERC;
- (2) PJM's proposal in Section 1.4A of the Operating Agreement revisions which would permit PJM to dictate, with this filing, the extent of State membership in any future PJM regional state committee;
- (3) PJM's proposal in Section 18.17.4(a)(ii) of the Operating Agreement revisions (and elsewhere) which would require the ICC to certify that it has statutory authority to prevent the release or disclosure of information received from PJM "to any other entity";
- (4) PJM's proposal in Section 18.17.4(c)(iii) of the Operating Agreement revisions to allow PJM members extensive objection and appeal rights concerning information requests submitted to PJM by a State Commission (thus indefinitely delaying state regulator access to needed information);
- (5) PJM's proposal in Section 18.17.4(a)(v) of the Operating Agreement revisions for PJM to prevent one Authorized Person from discussing PJM information with another Authorized Person;
- (6) PJM's proposal in Section 18.17.4(d)(ii) of the Operating Agreement revisions to retain unilateral control over what constitutes a breach of a Non-Disclosure Agreement and PJM's proposal to unilaterally terminate Non-Disclosure Agreements with State Commission employees (thus controlling the ability of those employees to do their jobs) at PJM's discretion;
- (7) PJM's proposal (Section 18.17.4(a)(ii) of the Operating Agreement revisions) obligating the State Commission to carry PJM's responsibilities by requiring the State Commission to engage in legal processes to defend against third party requests for information and to engage in legal processes to protect PJM's interests and the interests of PJM Members in the event that there has been a disclosure of PJM information to a third party;
- (8) PJM's proposal in Sections 18.17.4(c)(ii) and 18.17.4(c)(iii) of the Operating Agreement revisions to excessively delay responding to State Commission information requests and, under some circumstances, allowing for an unlimited delay in responding to information requests;

- (9) PJM's proposal in Section 2.5.4 of the Non-Disclosure Agreement to control and restrict the way that State Commissions may use PJM information to perform their State Commission duties; and
- (10) PJM's proposal in Section 3.a of the State Certification form to dictate when and how State Commissions will review their internal procedures for keeping confidential information.

For all these reasons and those explained below, the ICC recommends that the Commission deny PJM's proposed tariff revisions as filed and direct PJM to provide a more reasonable approach for state commissions to access confidential market data. In the alternative, should the Commission choose to accept this filing, the ICC strongly recommends that the Commission direct PJM to make the modifications proposed by the ICC below to PJM's proposed Operating Agreement revisions, the proposed Form of Non-Disclosure Agreement ("NDA"), and Form of Certification.

IV. DISCUSSION OF ISSUES

The April 29 filing consists of: (1) proposed revisions to the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. ("Operating Agreement") primarily to add Section 18.17.4 (Disclosure to Authorized Persons); (2) a Form of Non-Disclosure Agreement (Schedule 10); and (3) a Form of Certification (Schedule 10A). The ICC will address each of these documents in turn.

A. PJM’s Proposed Revisions to the PJM Operating Agreement to add Section 18.17.4 for Disclosure to Authorized Persons Need Additional Modifications To Accommodate the Needs of State Commissions and State Commission Employees

Section 1.4A--Definition of “Authorized Commission”

PJM proposes to add a definition of “Authorized Commission” to Section 1.4A of the Operating Agreement. The ICC recommends that definition be modified as follows:

“Authorized Commission” shall mean (i) a State public utility commission within the geographic limits of the PJM Region that regulates the distribution or supply of electricity to retail customers ~~and~~ or is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State or (ii) an association or organization ~~comprised exclusively of State public utility commissions described in the immediately preceding clause~~ (i) formed by States to act as a regional state committee as that concept is described in FERC’s Wholesale Market Platform White Paper.⁵

First, PJM’s proposed definition would prevent a State public utility commission from being an Authorized Commission unless it both “regulates the distribution or supply of electricity to retail customers” and “is legally charged with monitoring the operation of wholesale or retail markets.” This requirement is overly limiting and may improperly screen out some state commissions and prevent them from receiving access to confidential PJM data. State commissions need data from PJM in order to oversee and regulate utility operations, monitor markets, and ensure reliable system operations and efficient planning within the new regional context created by the Commission’s progressive market policies. However, not all state commissions perform the functions of old-style traditional regulation and new-style market oversight in the same way and in the same combinations. By linking the two referenced clauses

⁵ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Appendix A, at 16 (April, 2003)

with the conjunctive “and” rather than “or,” PJM would prohibit those state commissions that do not perform both functions from accessing needed data. The ICC can perceive no reason, nor does PJM provide any justification, for this unnecessary restriction.

Second, adoption of PJM’s proposed definition would result in pre-deciding the allowable membership in a possible future PJM regional state committee. If the Commission accepts PJM’s proposed Section 1.4A, then the states in the PJM region would be required to limit membership in their future regional state committee only to state public utility commissions performing both of the functions discussed in the previous paragraph. State commissions would be prohibited from extending regional state committee membership to a state commission providing one, but not the other of the two functions. Similarly, membership in the regional state committee could not be made available to state power siting agencies and other state agencies intimately involved in the regulation or oversight of the regional electric system. Such a prior restriction improperly ties the hands of state commissions as they debate whether to develop a PJM regional state committee and consider what form that committee should take and the extent of its membership. The Commission’s SMD White Paper clearly states that the “structure and function” of each RSC shall be “determined by the states within the region.”⁶ If the Commission accepts PJM’s proposed Section 1.4A, the proper deference that the SMD White Paper granted to each State with respect to regional state committee formation and membership would be thrown out the window and the PJM states would be improperly constrained to developing a PJM regional state committee with the narrow membership proposed by PJM in Section 1.4A. Accordingly, the Commission should modify Section 1.4A as proposed by the ICC above.

⁶ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Appendix A, at 16 (April, 2003).

Section 1.4B--Definition of “State Certification”

PJM proposes to add a definition of “State Certification” to Section 1.4B of the Operating Agreement. The ICC recommends that the definition be modified as follows:

“State Certification” shall mean the Certification of an Authorized Commission, pursuant to Section 18 of this Agreement, the form of which is appended to this Agreement as Schedule 10A, wherein the Authorized Commission identifies all Authorized Persons employed or retained by such Authorized Commission, ~~a copy of which shall be filed with FERC.~~

As written, the filing requirements imposed by this definition in Section 1.4B are unclear. The definition correctly notes that Schedule 10A would be appended to the Operating Agreement if the Commission accepts PJM’s proposal. In that context, PJM has already included Schedule 10A in its April 29 filing with the Commission. If that is what is meant by the last clause of PJM’s proposed “state certification” definition, namely, “a copy of which shall be filed with FERC,” then the ICC has no problems with the definition. However, if Section 1.4B intends to impose a requirement on each state commission to make a filing with the Commission whenever it adds or removes a name from its list of Authorized Persons, then the ICC objects to Section 1.4B and to such a filing requirement and recommends that the clause be stricken. If PJM wishes to impose on itself a requirement to make a filing with the Commission each time a State adds or removes a name from its list of Authorized Persons, the ICC would have no objection. If that is PJM’s intent, then the words “by PJM” should be added to the final clause in this paragraph so that it reads “a copy of which shall be filed with FERC by PJM.”

Section 1.43A--Definition of “Third Party Request ”

PJM proposes to add a definition of “Third Party Request” to Section 1.43A of the Operating Agreement. The ICC protests PJM’s proposed language because it seeks to

circumvent state law that may require disclosure to other agencies in certain circumstances, such as in the event of a state investigation into potential wrongdoing. The ICC recommends that definition be modified as follows:

"Third Party Request" shall mean any request or demand by any entity upon an Authorized Person or an Authorized Commission for release or disclosure of confidential information provided to the Authorized Person or Authorized Commission by the Office of the Interconnection or PJM Market Monitor. A Third Party Request shall include, but shall not be limited to, any subpoena, discovery request, or other request for confidential information made by any: (1) federal, ~~state~~, or local governmental subdivision, department, official, agency or court, or (ii) arbitration panel, business, company, entity or individual. A Third Party Request shall not include requests from other state agencies, departments, or officials of the state represented by the Authorized Commission.

As a general rule, information that companies must submit to the ICC under statute, order, or rule is a matter of public record unless the ICC orders otherwise. Information requested from a public utility or telecommunications carrier by Staff in the course of an investigation is not public, unless the ICC or a court enters an order to the contrary. With regard to the first category of information, material that companies are required to submit by statute, order, or rule, section 5--109 of the Public Utilities Act provides, in pertinent part:

All reports made to the Commission [ICC] by any public utility and the contents thereof shall be open to public inspection, unless otherwise ordered by the Commission. Such reports shall be preserved in the office of the Commission.⁷

As the preceding provision suggests, the ICC may accord confidential treatment to information that companies are required to submit and that would otherwise be deemed public. Section 4--404 of the Act, concerning the ICC's protection of confidential and proprietary information, states as follows:

⁷ 220 ILCS 5/5--109.

The Commission [ICC] shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity.⁸

In addition, improper disclosure of facts or information by an ICC officer or employee may be prosecuted and punished as a criminal offense. Section 5--108 of the Act provides:

Any officer or employee of the Commission [ICC] who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record, memorandum, book or paper of a public utility, except in so far as he may be authorized by the Commission or by a circuit court, shall be guilty of a Class A misdemeanor.⁹

The ICC's Rules of Practice contain a related provision addressing the matter of confidential and proprietary information. Section 200.430, on protective orders, allows the ICC to enter an order to protect the confidential nature of information received by the ICC. Although the normal time limit for confidential treatment is two years, and generally may not exceed five years, periods longer than five years may be allowed "upon a showing of good cause," as section 200.430(b) provides.

In deciding whether information should receive confidential treatment, the ICC customarily turns to the criteria that guide courts in their application of the Illinois Freedom of Information Act (5 ILCS 140/1 through 11) ("FOIA") and, in particular, the statute's exemption for trade secrets. Section 7(1)(g) of the Illinois FOIA exempts from the Act's disclosure requirements the following:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm, including all information determined to be confidential under Section 4002 of the Technology Advancement and Development Act. Nothing contained in this paragraph (g) shall be construed to prevent a person or business from consenting to disclosure.¹⁰

⁸ 220 ILCS 5/4--404.

⁹ 220 ILCS 5/5--108.

¹⁰ 5 ILCS 140/7(1)(g).

A person seeking disclosure of information made confidential or proprietary by the ICC could attempt to gain access to it through the Illinois FOIA. The courts would ultimately decide whether the ICC must disclose information sought under the FOIA, and a prior decision by the ICC granting information confidential or privileged status under section 7(1)(g) would not be binding on the judicial system. As explained in greater detail below, the terms of a confidentiality agreement between the ICC and the party submitting the information would similarly not be binding on a court, though the existence of such an agreement might be a relevant consideration in resolving the FOIA issue.

Section 3(a) of the FOIA provides, “Each public body shall make available to any person for inspection or copying all public records, except as provided in Section 7 of this Act.”¹¹ Section 2(c) of the FOIA defines the term “public records” as meaning “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body.”¹²

The FOIA is to be liberally construed in favor of disclosure, and exemptions to the statute’s requirements will be read narrowly. Bowie v. Evanston Community Consolidated School District No. 65, 128 Ill. 2d 373, 378, 538 N.E.2d 557, 559 (1989). In an action challenging a refusal to disclose information requested under the FOIA, the party resisting disclosure has the burden of establishing the claimed exemption. Lieber v. Southern Illinois University, 176 Ill. 2d 401, 408, 680 N.E.2d 374, 377 (1997).

¹¹ 5 ILCS 140/3(a).

¹² 5 ILCS 140/2(c).

The appellate court addressed the trade secrets exemption of section 7(1)(g) in Cooper v. Department of the Lottery, 266 Ill. App. 3d 1007, 640 N.E.2d 1299 (1994) (“Cooper”). In that case, the court refused to protect under section 7(1)(g) a marketing plan developed by a private contractor for the Department of the Lottery. Looking to cases interpreting the analogous provision of the federal freedom of information statute, the court stated, “Case law construing the Federal statute suggests that information is confidential only if disclosure would either inflict substantial competitive harm on the supplier of the information or impair the recipient agency’s ability to induce people to submit similar information to it in the future.” Cooper, 266 Ill. App. 3d at 1013, 640 N.E.2d at 1303. The court concluded that the Department was unable to establish either element of that standard. Among other things, the court noted that the Department enjoyed a monopoly over lottery operations in Illinois and, further, that there was no sign that the company responsible for the report had intended it to remain confidential.

The appellate court in Cooper relied on the standard expressed some years earlier in National Parks and Conservation Ass’n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (1974) (“National Parks”). In that case, the court of appeals interpreted the trade secrets exemption of the federal FOIA, which is worded similarly to the Illinois exemption, as requiring that commercial or financial information be deemed confidential “if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” National Parks, 498 F.2d at 770.

The ICC applied the National Parks criteria in Cass Long Distance Services, Inc. and Cass Telephone Co., No. 98--0060 (March 10, 1999) (“Cass Long Distance”). In that case, two related telephone companies--one providing long distance service, and the other providing local

service--had requested confidential treatment of their annual reports, invoking section 7(1)(g) of the FOIA. The ICC initially allowed both requests. Staff then sought to reopen the proceeding, contending that the local company's report should not be accorded confidential treatment. Reopening the proceeding, the ICC agreed with Staff and denied the local company's request. In the course of its discussion, the ICC applied the National Parks and Cooper decisions in concluding that the information the local company was seeking to protect was not confidential within the meaning of the Illinois FOIA. The ICC noted that the submitter's subjective preference for confidential treatment was not dispositive. Cass Long Distance, at 41.

In applying the trade secrets exemption of the federal FOIA, federal cases consistently state that an agreement to maintain the confidential nature of information is not alone sufficient to preserve its confidentiality under that provision of the federal law. Given the similar wording of the federal FOIA and Illinois FOIA trade secrets provisions, as well as the past reliance by Illinois courts on federal precedent in interpreting the Illinois exemption, it is likely that courts of this state would similarly hold that confidentiality agreements are not sufficient by themselves to secure, against FOIA disclosure, the confidentiality of information subject to an agreement.

As the federal cases explain, the test for confidentiality under the trade secrets exception is an objective one, and an agency's promise to keep the information in question confidential cannot be dispositive. To be sure, an agreement of that nature might provide some indication that the agency would not be able to obtain the information in question without promising confidentiality, and such an agreement might therefore be relevant to the analysis of the "impairment" part of the National Parks test: information will be deemed confidential if its disclosure is likely "to impair the Government's ability to obtain necessary information in the future." Still, a confidentiality agreement is not controlling, and cases have ordered disclosure

even though the information being sought had been submitted under a promise of confidentiality. Interpreting the federal FOIA exemption for trade secrets--numbered exemption 4 in the federal law--the court of appeals in GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994) (“GF Micro Corp.”), noted that the test for confidentiality under that provision is objective rather than subjective. The court went on to explain, “For example, whether the information is of a type which would normally be made available to the public, or whether the government has promised to keep the information confidential, is not dispositive under Exemption 4.” GF Micro Corp., 33 F.3d at 1113. In support of that point the court cited Petkas v. Staats, 163 U.S. App. D.C. 327, 501 F.2d 887, 889 (D.C. Cir., 1974) (“Petkas”), which, in discussing the trade secrets exemption of the federal FOIA, had stated, “Nor can a promise of confidentiality in and of itself defeat the right of disclosure.”

More recently, in Dow Jones Co. v. Federal Energy Regulatory Comm’n, 2002 U.S. Dist. Lexis 25643 (C.D. Cal. 2002), the district court rejected efforts by the FERC to maintain the confidentiality of information concerning the activities of some power marketers in California around the time of that state’s energy crisis. In that case, the agency argued that the information being sought should be protected under the trade secrets exemption of the federal FOIA and noted, in support, that it had been the subject of confidentiality agreements. The court disagreed with the FERC, explaining:

Agreements for confidentiality, standing alone, are insufficient to satisfy the requirements needed for nondisclosure under Exemption 4. [Citing GC Micro and Petkas.] If the Court were to accept defendant's argument, any agency could, theoretically, simply hand out promises of confidentiality to individuals who gave information in order to avoid judicial review as to whether a record can be withheld.¹³

¹³ Dow Jones, at 36-37.

Similar statements appear in other cases. See, e.g., General Electric Co. v. United States Nuclear Regulatory Comm’n, 750 F.2d 1394, 1400 (7th Cir. 1984) (“It is irrelevant to this conclusion that the report was the subject of a protective order and was received in camera. See, e.g., Petkas v. Staats, 163 U.S. App. D.C. 327, 501 F.2d 887, 889-90 (D.C. Cir. 1974). The Freedom of Information Act would have little bite if government agencies could escape its provisions just by stamping documents ‘classified’”); Robles v. Environmental Protection Agency, 484 F.2d 843, 846 (D.C. Cir. 1973) (“In resolving against disclosure, the District Court relied strongly on the fact that the agency had in some instances promised the householder that the results of the survey would be kept confidential. While, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure that the agency ‘received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the Act.’ Ackerly v. Ley 137 U.S. App. D.C. 133, 420 F.2d 1336, 1339-40, n.3 (1969); Legal Aid Society of Alameda County v. Shultz, 349 F. Supp. 771, 776 (D.C. Cal. 1972); ***”). Illinois cases, though not specifically addressing confidentiality agreements, express a similar thought. See Hoffman v. Department of Corrections, 158 Ill. App. 3d 473, 476, 511 N.E.2d 759, 761 (1987) (“Reliance upon self-determination by public officials and public employees as to what should and what should not be disclosed to the public would frustrate the purpose of the FOIA”).

Citing Petkas, among other cases, one commentator recently concluded, “The D.C. Circuit, which handles the largest number of FOIA cases, has stated repeatedly since the 1970's that all FOIA exemptions must be construed narrowly, in such a way to provide maximum access to agency records consistent with the overall purpose of the FOIA. In other words, a party's subjective desire to hide information from the public does not automatically deem the

information confidential. And signed confidentiality agreements are not particularly persuasive.” Rozwarski, Maximizing Pharmaceutical Industry Profits at the Taxpayers' Expense, 4 Pitt. J. Tech. L. & Policy 2 (2003).

Cooper, the lottery case discussed earlier, is the only Illinois judicial decision interpreting section 7(1)(g)’s exemption for trade secrets and confidential business information. Several New York cases involving utilities, however, have construed the analogous trade secret provisions in that state’s freedom of information statutes, and those decisions warrant brief comment here, as illustrations of how the trade secrets exemption might be applied in the public utility field. In Matter of New York State Electric & Gas Corp. v. New York State Energy Planning Board, 221 A.D. 121, 645 N.Y.S.2d 145 (1996), the court upheld a determination that protected from disclosure, as confidential information, efficiency data about particular facilities given to the state Energy Planning Board by an alternative power producer, Indeck Energy Services. The information was being sought by a company that was both a competitor and a counter party, and the court concluded that Indeck’s competitive position would be harmed if the information were disclosed.

A similar result was reached in Matter of Glen Falls Newspapers, Inc. v. Counties of Warrant and Washington Industrial Development Agency, 257 A.D.2d 948, 684 N.Y.S.2d 321 (1999). In that case, the court rejected an attempt by a newspaper to gain access to the details of a settlement agreement reached between a power company, Niagara Mohawk, and the operator and assignees of a trash incinerator plant concerning the price that Niagara Mohawk was to pay for power generated by the plant. The court reasoned that disclosure of the details of the settlement agreement could harm Niagara Mohawk’s ability to effectively negotiate with other power producers.

A third case, Matter of Sunset Energy Fleet, L.L.C. v. New York State Department of Environmental Conservation, 285 A.D.2d 865, 728 N.Y.S.2d 279 (2001), permitted disclosure of information submitted by a company to a state agency. In that case, the owner-operator of a new power plant had, as part of the permitting process, gathered an extensive array of information concerning sources of air pollution in the New York City area. The court concluded that the information compiled by the company did not qualify as a trade secret under the state's freedom of information law. The court noted that the information was publicly available through other sources and, further, that disclosure of the information would not harm the compiler's competitive position. The court concluded that the matter involved, in substance, a regulatory cost that the company had to be prepared to pay.

In general, information that companies are required to file with the ICC under statute, order, or rule is a matter of public record unless the ICC takes steps to protect its confidential nature; information obtained from public utilities or telecommunications carriers by Staff in the course of an investigation is confidential unless the ICC or a court orders otherwise. In either case, information made confidential by the ICC may be subject to disclosure, however, under the Illinois Freedom of Information Act. Whether disclosure is required by the FOIA will be resolved under the provisions of that statute, which contains a number of exemptions from its disclosure requirements; one exemption relevant here is provided by section 7(1)(g), protecting trade secrets and commercial and financial information. Confidentiality agreements entered into between administrative agencies and persons supplying information to them do not trump the provisions of the FOIA: disclosure may still be required by the FOIA, even though the parties have agreed to maintain the information at issue as privileged and confidential.

Section 18.17.4(a)

Section 18.17.4(a) sets forth conditions under which PJM will disclose confidential information to an Authorized Person. The ICC recommends that prefatory sentence of that section be modified as follows:

Notwithstanding anything in this section to the contrary, the Office of the Interconnection and/or the PJM Market Monitor ~~may~~shall disclose confidential information, otherwise required to be maintained in confidence pursuant to this Agreement, to an Authorized Person under the following conditions:

If a state commission has satisfied all of the conditions in Section 18.17.4(a), then PJM should be required to provide the information to the state commission. The language of the section should not permit any possibility that a state commission would satisfy all of the stated conditions, but still not receive the information from PJM. However, by using the word “may” rather than “shall” in the paragraph above, PJM provides for itself the option of not providing information, even to a state commission that has satisfied all of the stated conditions. The Commission should not permit that option to stand and should direct PJM to modify this Section as proposed by the ICC above.

Section 18.17.4(a)(i)

Section 18.17.4(a)(i) states conditions placed on the Authorized Person by the Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

The Authorized Person has executed a Non-Disclosure Agreement with the Office of the Interconnection, representing and warranting that he or she: (i) is an Authorized Person; (ii) is duly authorized to enter into and perform the obligations of the Non-Disclosure Agreement; (iii) has ~~adequate~~adequate procedures, consistent with the practices of the relevant Authorized Commission to protect against the release of any confidential information received, and (iv) is familiar with, and will comply with any applicable procedures of the Authorized Commission which the Authorized Person represents, ~~(v) covenants and agrees on behalf of himself or herself to deny any Third Party Requests and defend against any legal process which seeks the release of any confidential information received in contravention of the terms of the Non-Disclosure Agreement, and (vi) is not in~~

~~breach of any Non-Disclosure Agreement entered into with the Office of the Interconnection.~~

This section places on the Authorized Person the burden to represent and warrant that he or she “has adequate procedures to protect against the release of any confidential information received.” Placing this burden on the Authorized Person is to misplace the burden. The Authorized Person, who, in many cases, may be a lower level staff technical person, is not in a position to represent and warrant that procedures are “adequate.” The term “adequate” is not defined in the document. The burden to make such a determination should not fall upon an Authorized Person. Indeed, it is an impossible burden for any one person to meet – particularly given the mountain of increased obligations and potential liabilities imposed upon the state commissions and its representatives that would result from adopting PJM’s proposal in the April 29 filing. The ICC believes that it is sufficient that the Authorized Person represent that he or she is following the confidentiality practices of the applicable State Commission.

Similarly, this Section requires the Authorized Person to “covenant[s] and agree[s] on behalf of himself or herself to . . . defend against any legal process which seeks the release of any confidential information received in contravention of the terms of the Non-Disclosure Agreement.” Obligating the Authorized Person to “defend against any legal process which seeks the release of any confidential information” is a misplaced obligation. Once again, an Authorized Person may, in some cases, be a lower level technical staff person who just analyzes numbers. It would not be appropriate to place on such a staff person a burden to defend against legal processes. Furthermore, it is not clear what is meant by “received in contravention of the terms of the Non-Disclosure Agreement.” We might ask, “received by whom?” Is the clause meant to refer to information received by the Authorized Requestor in contravention of the terms of the Non-Disclosure Agreement? If so, it seems strange and misplaced for PJM’s Operating

Agreement to attempt to control the treatment of confidential information that PJM provided to the Authorized Person in contravention of the Non-Disclosure Agreement (the NDA is proposed by PJM to be part of the PJM Operating Agreement) by placing a burden on the Authorized Person. It seems more reasonable to conclude that what PJM intends to say with the word “received ” is “that would be released.” Accordingly, despite the ICC’s recommendation that it be deleted, if the Commission permits PJM to keep subsection 18.17.3(a)(i)(v), then the word “received ” should be replaced with “that would be released.”

Finally, this Section requires the Authorized Person to represent and warrant that he or she “is not in breach of any Non-Disclosure Agreement entered into with the Office of the Interconnection.” Placing the burden to make this legal warranty and representation on each Authorized Person is to misplace the burden because not all Authorized Persons will be able to make such warranty and representation in a fully informed manner. For all these reasons, the ICC recommends that the Commission direct PJM to modify Section 18.17.4(i) as stated above.

Section 18.17.4(a)(ii)

Section 18.17.4(a)(ii) states conditions placed on the Authorized Commissions. The ICC recommends that section be modified as follows:

The Authorized Commission employing or retaining the Authorized Person has provided the Office of the Interconnection with: (a) a final order of FERC ~~prohibiting the release by the Authorized Person or the Authorized Commission of confidential information in accordance with~~ approving the addition of Section 18.17.4 to the terms of this Agreement and accepting the Form of Non-Disclosure Agreement and the Form of Certification; and (b) ~~either an order of such Authorized Commission or a certification from counsel to such Authorized Commission, confirming that the Authorized Commission~~ notice that it (i) has statutory authority to protect the confidentiality of any confidential information received from public release or disclosure ~~and from release or disclosure to any other entity,~~ (ii) ~~will defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including,~~

~~but not limited to, obtaining any necessary protective orders, (iii) will provide promptly notify the Office of the Interconnection with prompt notice of any such Third Party Request or legal proceedings related thereto and will consult/cooperate with the Office of the Interconnection and/or any Affected Member in its efforts to deny the Third Party Request or defend against such legal process~~this regard, (iiiiv) in the event a protective order or other remedy is denied, will direct Authorized Persons authorized by it to furnish only that portion of the confidential information which their legal counsel advises the Office of the Interconnection in writing is legally required to be furnished, (iv) will exercise its best efforts to obtain assurance that confidential treatment will be accorded to such confidential information and (vi) has adequate procedures or practices to protect against the release of such confidential information; and (e) confirmation in writing that the Authorized Person is authorized by the Commission to enter into the Non-Disclosure Agreement and to receive confidential information under this Agreement.

First, PJM's proposal contained in the provision in this section that would make state commissions subject to the FERC in the form of an Order from the FERC prohibiting a state commission from taking certain steps and engaging in certain actions is entirely inappropriate and unacceptable. FERC does not have authority over State Commissions in this regard and PJM has provided no evidence that it does. To the contrary, the ICC is statutorily obligated to follow the laws of the Illinois General Assembly, the Governor of Illinois, and duly authorized judicial bodies. PJM has gone so far as to include in its Filing Letter to the Commission specific language that PJM proposes that the Commission include in the Order envisioned in Section 18.17.4(a)(ii).¹⁴ PJM proposes that the Commission's Order state the following: "Authorized Persons' and Authorized Commissions' disclosure of the confidential information to any other person is prohibited by this order . . ." As stated above, the ICC, in certain circumstances, may be required by state law to disclose information to other state agencies or officials. The ICC believes that it is the obligation of the party claiming trade secret protection over the materials, not the state commission, to maintain that proprietary designation. Any efforts of PJM to push that obligation onto the state commissions or others is in particularly bad faith and not legally

¹⁴ PJM Filing Letter at 9.

sustainable. PJM has not justified such a shift in the burden. Because the ICC has a legal burden to protect confidential information unless it is legally required to disclose it, and the state commission has procedures in place to follow the law, the ICC has every incentive to maintain that confidentiality and would only disclose information if it is under a legal obligation to do so. PJM's proposal essentially requires state commissions to obtain an order from FERC prohibiting that state commission from following state law. This is absurd. In the event that the Commission actually considers adopting that provision, the ICC points out that the Federal Power Act expressly limits the Commission's jurisdiction to "only those matters which are not subject to regulation by the States."¹⁵

As set forth in detail above, Illinois is a retail access state. The ICC is charged with a statutory obligation to oversee the markets as well as grid operations and planning. In order to carry out that legal obligation, the ICC must have access to the relevant data and the ICC has procedures in place to protect that data. The ICC believes that PJM's proposal to impose Commission authority over the state commissions is an attempt to circumvent the very essence of the process.

Second the ICC protests the complicated formal processes that PJM proposes in Section 18.17.4(ii) to require "either an order of such Authorized Commission or a certification from counsel to such Authorized Commission" where a simple notice should suffice. In proposed Section 18.17.4(ii), PJM has proposed such an oppressive, lengthy, burdensome process that it would not be feasible to accomplish the purpose for which it is intended.

Third, it is entirely inappropriate for the state to bear the burden of defending against Third Party requests for information in any ensuing legal proceedings. A state should be required only to notify PJM and cooperate with PJM when there is a Third Party request. The

¹⁵ 16 U.S.C.S. § 824.

ICC believes that it is the party claiming trade secret protection that should be defending that claim. The state commission is not in a position to determine the validity of whether PJM and its Affected Member's information is, in fact, confidential. Therefore, the ICC believes that PJM's proposed language here would inappropriately require the states to shoulder PJM's obligations and PJM has not provided any explanation as to why this would be appropriate. The Commission should not condone PJM's attempt to thwart the very intent of the process, which is to facilitate, not aggravate, state commission access to necessary data.

Finally, the requirement in clause (c) of PJM's proposed paragraph above would require an Authorized Commission to provide PJM with "confirmation in writing that the Authorized Person is authorized by the Commission to enter into the Non-Disclosure Agreement and to receive confidential information under this Agreement." However, this requirement is unnecessary in this place. The Form of Certification (PJM's proposed Schedule 10A) includes an Exhibit A that is the list of the Authorized Commission's designated Authorized Persons. The Form of Certification specifies a procedure for completing and updating the list in Exhibit A. The additional confirmation requested in clause (c) of Section 18.17(c)(ii) above, is unnecessary and potentially confusing and conflicting.

For all these reasons, the ICC recommends that the Commission direct PJM to modify Section 18.17.4(ii) as stated above.

Section 18.17.4(a)(v)

Section 18.17.4(a)(v) establishes a limited procedure under which one Authorized Person may discuss confidential information with another Authorized Person. The ICC recommends that section be modified as follows:

~~The Authorized Person may discuss confidential information with other Authorized Persons who are parties to Non-Disclosure Agreements; provided, however, that the Office of the Interconnection shall have confirmed in advance and in writing that it has previously released the confidential information in question to such Authorized Persons. The Office of the Interconnection shall respond to any written request for confirmation within two (2) business days of its receipt.~~

As written, PJM's proposal would prevent one Authorized Person from discussing confidential information with another Authorized Person unless both have requested and received from PJM the same confidential information. Under PJM's proposed approach, not only would an Authorized Person be prohibited from discussing confidential information with another Authorized Person in another State commission, but the Authorized Person would be prohibited from discussing confidential information with any colleague in his or her own State commission who is an Authorized Person and otherwise eligible to receive confidential information unless each Authorized Person has requested and received from PJM the same confidential information.

To illustrate the un-workability of PJM's proposed approach, the following scenario can be sketched out: (1) Authorized Person A wishes to discuss with Authorized Person B confidential information that Authorized Person A has received from PJM; (2) Authorized Person A would contact PJM and ask whether Authorized Person B has requested and received the same confidential information that Authorized Person A has requested and received; (3) PJM has allowed itself up to two business days to respond to Authorized Person A's inquiry about Authorized Person B; (4) assume that PJM's response to Authorized Person A's inquiry is that Authorized Person B has not requested and received the same confidential information from PJM; (5) Authorized Person A then might contact Authorized Person B and suggest that Authorized Person B make a request for particular confidential information from PJM; (6)

assuming that Authorized Person B makes such an information request to PJM, PJM has allowed itself no fewer than 5 days under Section 18.17.4(c)(ii) to respond to Authorized Person B (and PJM has allowed itself an unlimited period of time if there is an objection or an appeal under the provisions of proposed Section 18.17(c)(iii)); (7) only after Authorized Person B has received the requested information from PJM and PJM has provided confirmation of that fact to Authorized Person A (such confirmation possibly taking up to two additional business days) could Authorized Person A and Authorized Person B begin to discuss the confidential information.

This likely scenario starkly illustrates the procedurally burdensome nature of PJM's proposed approach for one Authorized Person simply to discuss confidential information with another Authorized Person. Indeed, PJM's proposal appears primarily designed to hinder and delay the effective use of confidential information by an Authorized Person and is not in the spirit of good faith process. The ICC recommends that the Commission reject PJM's approach and permit unrestricted contact between Authorized Persons and unrestricted discussion of PJM information by Authorized Persons.

Finally, Section 18.17.4(a)(v) does not specify whether its restrictions on the ability of one Authorized Person to discuss confidential information with another Authorized Person apply to information conveyed by PJM under the oral disclosure provisions of Section 18.17.4(b) or just to the written disclosure provisions of Section 18.17.4(c). If the Commission permits the restrictions to apply at all, the Commission should require PJM to clarify that they do not apply to oral disclosures under Section 18.17.4(b) so that Authorized Persons receiving oral disclosures of PJM information would be freely permitted to discuss that information with other Authorized Persons.

Section 18.17.4(b)

Section 18.17.4(b) establishes a procedure for limited oral disclosure of confidential PJM information to Authorized Persons. The ICC recommends that section be modified as follows:

The PJM Market Monitor or other designated representative of the Office of the Interconnection may, in the course of discussions with an Authorized Person, orally disclose information otherwise required to be maintained in confidence, without the need for a prior Information Request. Such oral disclosures shall provide enough information to enable the Authorized Person or their Authorized Commission to determine whether additional Information Requests for information are appropriate. The PJM Market Monitor or other representative of the Office of Interconnection will not make any written or electronic disclosures of confidential information to the Authorized Person pursuant to this section. In any such discussions, the PJM Market Monitor or other representative of the Office of the Interconnection shall ensure that the individual or individuals receiving such confidential information are Authorized Persons as defined herein, orally designate confidential information that is disclosed, and refrain from identifying any specific ~~market participant~~ Affected Member whose information is disclosed. The PJM Market Monitor or other representative of the Office of Interconnection shall also be authorized to assist Authorized Persons in interpreting confidential information that is disclosed. The PJM Market Monitor or representative of the Office of the Interconnection shall provide any Affected Member with ~~oral~~ notice of any oral disclosure immediately, but not later than one (1) business day after the oral disclosure. Such ~~oral~~ notice to the Affected Member shall include the substance of the oral disclosure, but shall not reveal any confidential information of any other Member ~~and must be received by the Affected Member before the name of the Affected Member is released to the Authorized Person~~; provided however, the identity of the Affected ~~Party~~ Member must be made to the Authorized Person within two (2) business days of the initial oral disclosure.

First, it is the ICC's position that PJM's proposal to shield for several days the identity of the entity whose information is orally disclosed to an Authorized Person under the provisions of this section is not in keeping with the spirit of providing State commissions with access to confidential information that they need in a timely way to perform their duties. Moreover, PJM's use of the term "market participant" in Section 18.17.4(b), rather than "Affected Member," significantly expands the blanket of protection from disclosure that PJM would be

providing. Affected Members are a subset of the much larger undefined category of market participants. PJM owes a certain duty of care for Affected Members under the Operating Agreement that PJM does not owe to market participants who are not PJM Members. Accordingly, the Commission should direct that the term “market participant” in Section 18.17.4(b) be changed to “Affected Member.”

Second, there is no apparent reason to limit the manner in which PJM is required to give notice to the Affected Member that confidential information associated with that Affected Member was disclosed by PJM in the oral discussions with Authorized Persons. Section 18.17.4(b) would prohibit PJM from providing written notice, for example, to Affected Members. PJM’s April 29, 2004 filing offers no explanation for why such restrictions are needed.

Finally, the clause that mandates that the notification of the oral disclosure be received by the Affected Member before its identity is revealed and the clause that mandates that the identity must be disclosed within two business days are contradictory. Furthermore, placing on PJM the requirement to ensure that the Affected Member “receives” notice of the oral disclosure of confidential information has the potential to delay the process of providing information to the state commissions. If the Commission accepts this provision in Section 18.17.4(b), it should be sufficient to place on PJM the burden of providing notification, rather than ensuring that an Affected Member received the notice. In any event, the ICC recommends that the Commission direct PJM to delete the provision concerning receipt of the notice by the Affected Member.

Section 18.17.4(c)(i)

Section 18.17.4(c)(i) establishes provisions under which an Authorized Person may submit written Information Requests to PJM. The ICC recommends that section be modified as follows:

Information Requests to the Office of the Interconnection shall be in writing, which shall include electronic communications, addressed to the PJM Market Monitor or other designated representative of the Office of the Interconnection, and shall: ~~(a) describe with particularity the information sought; (b) provide a description of the purpose of the Information Request; (c) state the time period for which confidential information is requested; and (d) re-affirm that only the Authorized Person shall have access to the confidential information requested.~~ The Office of the Interconnection shall provide an Affected Member with written notice, which shall include electronic communication, of an Information Request of the Authorized Person as soon as possible, but not later than two (2) business days after the receipt of the Information Request.

First, PJM's April 29 filing provides no explanation for why the information sought by an Authorized Requestor would need to be identified "with particularity." Furthermore, the "with particularity" standard is not defined. The ICC is concerned that PJM could use the "with particularity" requirement to reject Information Requests that PJM might not want to respond to or to delay matters by nitpicking the "with particularity" standard. Furthermore, it will be in the best interests of the Authorized Requestor to make clear with particularity in its Information Request exactly what information is being sought from PJM. However, allowing that standard to be a mandatory threshold in PJM's tariff provides PJM with a weapon to block or delay State commissions' access to needed information. Accordingly, the ICC recommends deletion of the phrase "with particularity."

Second, PJM's April 29 filing provides no explanation for why an Authorized Commission and an Authorized Requestor should be required to provide to PJM a "description of the purpose of the Information Request." It is not and should not be within PJM discretion to

determine whether a state commission is justified in requesting particular information. To the extent that an Authorized Requestor wishes to voluntarily provide PJM with a description of the purpose for which the information is sought so as to assist PJM in better providing the sought-for information, then the Authorized Requestor should not be prohibited from stating the purpose. However, allowing PJM's tariff to mandate that the Authorized Person state the purpose of the Information Request is to put the State commission at a disadvantage in performing its duties. Accordingly, the ICC recommends deletion of the clause requiring a description of the purpose of the Information Request.

Third, PJM's April 29 filing provides no explanation for why PJM needs upfront information about "the time period for which confidential information is requested" in order to provide the Authorized Requestor with information that is being sought. Again, PJM is missing the point here. It is not within the PJM purview to determine the time allotment of state commission review. Would PJM's response to the data request be different if the Authorized Requestor states a desire to retain the information for two years rather than two weeks? Furthermore, if the clause is intended to be applicable to the historical time period for the events being asked about in the Information Request, e.g., the month of June, 2003, rather than the forward time period for which the Authorized Requestor is seeking to retain the information, then the language is not clear in this regard. Finally, if the purpose of the clause is to apply to an historic period, there is no reason to include this requirement in the tariff because it will be in the best interests of the Authorized Requestor to clearly state the historical period for which data is sought. In any event, for all of these reasons, the ICC recommends deletion of the clause requiring the Authorized Requestor to specify "the time period for which confidential information is requested."

Finally, PJM's April 29 filing provides no explanation for why it is necessary to require an Authorized Person to "re-affirm that only the Authorized Person shall have access to the confidential information requested" each time the Authorized Person makes an Information Request. PJM will already have in hand a signed Non-Disclosure Agreement from the Authorized Requestor and a signed Certification from the Authorized Commission. The ICC believes that requiring a re-affirmation each time an Information Request is submitted would add nothing to the process but an additional burden upon the state commission. Furthermore, as to the substance, the ICC opposes the restriction of information access only to the Authorized Requestor who made the Information Request. It is the ICC's position that any Authorized Requestor should be able to discuss confidential information with any other Authorized Requestor. Accordingly, the ICC recommends deletion of the clause requiring re-affirmation as burdensome and unnecessary.

Section 18.17.4(c)(ii)

Section 18.17.4(c)(ii) establishes provisions under which PJM will respond to an Information Request. The ICC recommends that section be modified as follows:

Subject to the provisions of section (c)(iii), the Office of the Interconnection shall supply confidential information to the Authorized Person in response to any Information Request within the time period specified in the Information Request, but in no event later than five (5) business days of after the receipt of the Information Request, to the extent that unless the requested confidential information can only reasonably be made available within such an extended time period; provided however, that in no event shall confidential information be released prior to the end of the fourth (4th) business day without the express consent of the Affected Member. To the extent that the Office of the Interconnection cannot reasonably prepare and deliver the requested confidential information within the time frame specified in the Information Request or such the five (5) day period, it shall, within such period, hold discussions with the Authorized Person and provide the Authorized Party Person with an agreed-upon written schedule for the provision of such remaining confidential information.

Upon providing confidential information to the Authorized Person, the Office of the Interconnection shall either provide a copy of the confidential information to the Affected Member(s), or provide a listing of the confidential information disclosed; provided, however, that the Office of the Interconnection shall not reveal any Member's confidential information to any other Member.

First, to the extent it is reasonable, PJM should be obligated to provide the information sought by the Authorized Requestor in the time frame requested by the Authorized Requestor. The ICC's proposed modifications would accomplish this result by establishing that information will be provided in the time frame requested (or five days) unless it would not be reasonably possible for PJM to comply with the request within that time frame. In such cases, the ICC recommends that PJM be required to negotiate an appropriate response schedule with the Authorized Person.

Second, in the following Section, the ICC is recommending that the objection and appeal process provided by PJM in proposed Section 18.17.4(c)(iii) not be available to Affected Members for the reasons explained there. Therefore, there is no reason to include the 4-day delay proposed in this section to allow an Authorized Member time and opportunity to exercise the objection option. Accordingly, the ICC recommends that the 4-day provision be deleted from Section 18.17.4(c)(ii) as proposed above.

Section 18.17.4(c)(iii)

Section 18.17.4(c)(iii) establishes provisions for PJM or an Affected Member to object to an Information Request and appeal to the Commission. The ICC recommends that section be modified as follows:

Notwithstanding section (c)(ii), above, should the Office of the Interconnection ~~or an Affected Member~~ object to an Information Request or any portion thereof, ~~either of them~~ the Office of the Interconnection may, within four (4) business days following the Office of the Interconnection's receipt of the Information

Request, request, in writing, a conference with the Authorized Commission or the Authorized Commission's authorized designee to resolve differences concerning the scope or timing of the Information Request; provided, however, nothing herein shall require the Authorized Commission to participate in any conference. ~~Any~~ Either party to the conference may seek assistance from FERC staff in resolution of the dispute. Should such conference be refused by ~~any participant~~ the Authorized Commission, or not resolve the dispute, then the Office of the Interconnection, ~~the Affected Member~~ or the Authorized Commission may initiate appropriate legal action at FERC within three (3) business days following receipt of written notice from ~~any conference participant~~ the Authorized Commission refusing or terminating such conference. Any complaints filed at FERC objecting to a particular Information Request shall be designated by the party as a "fast track" complaint and ~~each party~~ the Office of the Interconnection shall bear its own costs and those of the Authorized Commission in connection with such FERC proceeding. If no FERC proceeding regarding the Information Request is commenced within such three day period, the Office of the Interconnection shall ~~utilize its best efforts to~~ respond to the Information Request promptly within four (4) business days of PJM's receipt of notice from the Authorized Commission refusing a proffered conference or from either party's issuance, or FERC issuance, of notice terminating a conference. Should either the Office of the Interconnection or the Authorized Commission have initiated a FERC proceeding to resolve a dispute, and the Authorized Commission prevailed, then the Office of the Interconnection shall provide the information requested by the Authorized Commission within one (1) business day of the FERC's issuance of findings. Should an objection covered by this section only apply to a portion of an Information Request and not to its entirety, then the Office of the Interconnection shall respond to the portion not objected to pursuant to the terms of subsection (ii).

First, the objection provisions of this Section 18.17.4(c)(iii) should not be available to Affected Members as the language in the Section provides. By its own terms, Section 18.17.4(c)(iii) allows for objections to "resolve differences concerning the scope or timing of the Information Request." An Affected Member has no standing to object to the "scope or timing" of an Information Request. Scope or timing issues with an Information Request may well affect PJM and PJM's ability to timely respond to the Information Request. However, Affected Members are not affected by the scope or timing of an Information Request because the Information Request, by definition, can apply only to information already in the possession of PJM or the PJM Market Monitor. Accordingly, for this reason, PJM might fairly be accorded

rights to object to an Information Request and rights to appeal to FERC. However, Affected Members have no grounds to object to an Information Request on the basis of scope or timing.

If it is argued that, despite the plain language of Section 18.17.4(c)(iii) limiting objections to scope or timing issues (about which Affected Members have no standing), Affected Members should have rights to object to Information Requests and to appeal to FERC, the ICC disagrees. After all, the information at issue in Section 18.17.4 is information that is in the possession of PJM or the PJM Market Monitor as a consequence of those entities' duties to operate a regional transmission grid and administer a regional power market. Those RTO duties could not have evolved and developed without the forbearance or assistance of State legislatures and State commissions in efforts to move the electric industry from one where customers are protected through comprehensive regulation to one where customers are principally protected by the workings of competitive markets. Unlike State Commissions, not all Affected Members have sincere interests in seeing that competitive markets operate efficiently and fairly. Accordingly, the Commission needs to consider carefully the consequences of providing rights to Affected Members to object to and appeal Information Requests submitted to RTOs by State Commissions. The ICC urges the Commission not to create such rights for Affected Members.

Furthermore, given that PJM's proposal would require a State Commission to sign a detailed certification attesting in numerous ways to its ability and intention to keep confidential PJM data confidential and that each Authorized Requestor is required to sign a detailed Non-Disclosure Agreement promising the same, the ICC believes that it is reasonable to assess the motives behind this attempt by the Affected Members to create a right to object to Information Requests by Authorized Persons and a right to appeal PJM's decisions concerning those Information Requests to FERC. Arguably, Affected Members may not genuinely be concerned

about release of confidential data beyond the Authorized Persons and Authorized Commissions, but, rather, they may be concerned about release of confidential data to the Authorized Persons and Authorized Commissions. That is, they may seek to hide key information from the Authorized Commissions. This provides a very strong reason why State Commissions should receive access to confidential RTO information and for the FERC to ensure that undue roadblocks are not thrown up to prevent broad and timely access by State Commissions to confidential RTO information. Accordingly, the ICC recommends that the Commission modify Section 18.17.4(c)(iii) as recommended above so that Affected Members do not have objection rights and appeal rights with regard to decisions made by PJM about responses to Information Requests from Authorized Persons.

Second, PJM's proposal would have the Authorized Commission bear its own costs if PJM or an Affected Member wishes to appeal to FERC in an effort to avoid or delay providing an Authorized Person with the information requested by an Authorized Person. Imposing such costs on an Authorized Commission appears to be yet another means to discourage State Commissions from making information requests to PJM. A State Commission will not even consider making certain types of information requests under the arrangements proposed by PJM if there is a very real possibility that the State Commission might be dragged through lengthy and expensive administrative proceedings at FERC. The ICC recommends that, if an objection and appeal option is approved by the Commission, such approval be provided only on the condition that PJM will bear both its own costs and those of the State Commission when objections are made and conferences are held and when appeals of information requests are made to FERC.

Third, PJM's proposed language leaves open PJM's response deadline in cases where no FERC proceeding is initiated. Rather, PJM commits only to respond "promptly." The ICC

recommends that, the commitment to respond “promptly” be changed to a commitment to respond “within four (4) business days of PJM’s receipt of notice from the Authorized Commission refusing a proffered conference or from either party’s issuance, or FERC issuance, of notice terminating a conference.” Four days after the termination of the conference or, if no conference is initiated, four days after PJM receives notice from the state commission refusing the conference equals one day after PJM’s deadline to decide if it wants to dispute the matter in a FERC proceeding. At that point, PJM will have had the information request in hand for at least nine business days, and far longer if a conference was held. Further delay would be unwarranted.

Similarly, PJM’s proposal leaves entirely open-ended PJM’s response deadline in cases where either PJM or the Authorized Commission initiated a FERC proceeding to resolve a dispute, and the Authorized Commission prevailed. The ICC recommends that, in such cases, PJM should be required to provide the information requested by the Authorized Commission within one (1) business day of the FERC’s issuance of findings.

Finally, the ICC recommends addition of the final sentence in the passage above addressing cases where only a portion of an Information Request is subject to an objection. In such cases, the portion of the Information Request that is not the subject of the objection should not get rolled into the appeals process.

Section 18.17.4(d)

Section 18.17.4(d) addresses breaches of the Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

In the event that both the Office of the Interconnection and the Authorized Commission agree that a ~~of any~~ breach of a Non-Disclosure Agreement has occurred or FERC has made a ruling that a breach has occurred:

A breach should only be considered to have occurred if: (1) both PJM and the Authorized Commission agree that a breach has occurred; or (2) FERC has found a breach to have occurred. Neither PJM nor an Affected Member should be able to unilaterally declare a breach. The ICC's proposed change to the prefatory language in Section 18.17(d) would establish this condition.

Section 18.17.4(d)(ii)

Section 18.17.4(d)(ii) establishes provisions under which PJM may terminate a Non-Disclosure Agreement with an Authorized Person. The ICC recommends that section be deleted because it would give PJM improper authority over the job activities of State employees. If the Commission decides not to delete this section in its entirety, the ICC recommends that it be modified as follows:

~~The Office of the Interconnection shall terminate such NonDisclosure Agreement upon written notice to the Authorized Person and his or her Authorized Commission, and all rights of the Authorized Person thereunder shall thereupon terminate; provided, however, that the Office of the Interconnection may restore an individual's status as an Authorized Person after consulting with the Affected Member and to the extent that: (i) the Office of the Interconnection determines that the disclosure was not due to the intentional, reckless or negligent action or omission of the Authorized Person; (ii) there were no harm or damages suffered by the Affected Member; or (iii) similar good cause shown. The Authorized Commission will review the designation as an Authorized Person of the Authorized Person who committed the breach. Any appeal of the Office of the Interconnection's actions~~ Authorized Commission's findings or actions in the review process under this section shall be to FERC.

As stated above, it is not appropriate for PJM to acquire the type of authority over State commission staff persons' job activities that Section 18.17.4(d)(ii) would appear to provide to PJM. Neither would it be appropriate for FERC to grant such authorization to PJM. In the event that (1) both PJM and the Authorized Commission agree that a breach has occurred; or (2) FERC has found a breach to have occurred, it would be appropriate for the Authorized Commission to

initiate a review to assess whether or not the Authorized Person who committed the breach should be entitled to remain on that Commission's list of Authorized Persons. The ICC's proposed modification above to Section 18.17.4(d)(ii) would require the Authorized Commission to initiate that review. The ICC recommends that FERC direct PJM to make this modification.

Section 18.17.4(d)(iii)

Section 18.17.4(d)(iii) addresses the relief available to PJM or an Affected Member in cases of an alleged breach of a Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

~~The Office of the Interconnection and/or the Affected Member shall have the right to seek and obtain at least the following types of relief: (a) an order from FERC requiring any breach to cease and preventing any future breaches; (b) temporary, preliminary, and/or permanent injunctive relief with respect to any breach found by FERC; and (c) to the extent that both the Office of the Interconnection and the Authorized Commission agree that a breach has occurred or FERC has made a ruling that a breach has occurred, the immediate return of all confidential information in the custody of the Authorized Person found to have committed the breach to the Office of the Interconnection.~~

First, because Affected Members will not be parties to the Non-Disclosure Agreement, it would not be appropriate for Affected Members to be granted the rights proposed by PJM in this Section. Consequently, reference to "Affected Members" should be deleted from this Section.

Second, as established above, a breach should only be considered to have occurred if: (1) FERC has found a breach to have occurred; or (2) both PJM and the Authorized Commission agree that a breach has occurred. Neither PJM nor an Affected Member should be able to unilaterally declare a breach.

Finally, clause (c) in PJM's proposal should be modified as proposed by the ICC to clarify obligations for the return of confidential information when it has been determined that a

breach has occurred. PJM's language leaves this obligation unclear. The ICC's proposed modification would make clear that PJM may seek the return of all confidential information that is in the custody of the Authorized Person found to have committed the breach.

For all these reasons, the ICC recommends modification of Section 18.17.4(d)(iii) as proposed above.

Section 18.17.4(d)(iv)

Section 18.17.4(d)(iv) addresses liability of Authorized Persons under the Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

No Authorized Person shall have responsibility or liability whatsoever under the Non-Disclosure Agreement or this Agreement for any and all liabilities, losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with the release of confidential information to persons not authorized to receive it, provided that such Authorized Person is an employee or member of an Authorized Commission at the time of such unauthorized release. Nothing in this Section ~~(d)(ii)~~ (d)(iv) is intended to limit the liability of any person who is not an employee of or a member of an Authorized Commission, or an agent to the Authorized Commission, at the time of such unauthorized release for any and all economic losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with such unauthorized release.

First, the reference in this Section to Section (d)(ii) is incorrect. The correct reference is Section (d)(iv).

Second, the effect of the last sentence of this Section would be to make the Authorized Commission's contractors, consultants, and outside counsel fully subject to liability arising out of the Non-Disclosure Agreement. This kind of liability exposure would have a chilling effect on such entities and unreasonably impact a State Commission's options in deciding how it gets

its work done, e.g., utilizing internal employees or consultants. Accordingly, the ICC recommends that this section be modified as proposed above.

B. PJM's Proposed Form of Non-Disclosure Agreement Requires Modifications to Accommodate the Needs of State Commissions and State Commission Employees

Recitals

The fourth paragraph under the Recitals section of the NDA states:

Whereas, the Operating Agreement ~~permits~~ requires PJM and the PJM Market Monitor to disclose Confidential Information to Authorized Persons upon satisfaction of conditions stated in the Operating Agreement, ~~including, but not limited to, and~~ the execution of this Agreement by the Authorized Person and the maintenance of the confidentiality of such information pursuant to the terms of this Agreement;

The ICC protests the PJM proposed language here as providing PJM an excessive amount of discretion in what it may provide in response to an information request. The ICC believes that if an Authorized Commission and the Authorized Person satisfy the established criteria in this burdensome proposed process, PJM should be “required” to disclose the confidential information requested by an Authorized Requestor—not just “permitted” to do so as proposed by PJM in the above paragraph. Furthermore, as proposed by PJM through usage of the phrase “including, but not limited to,” the conditions that an Authorized Person might need to satisfy could be unlimited. The ICC’s proposed language modification would remove the open-ended nature of the obligations on an Authorized Person and limit those obligations to those specified in the Operating Agreement and the Non-Disclosure Agreement.

Section 1.2

Section 1.2 defines “Authorized Commission.” The ICC recommends that definition be modified as follows:

Authorized Commission. (i) A State (which shall include the District of Columbia) public utility commission within the geographic limits of the PJM Region (as that term is defined in the Operating Agreement) that regulates the distribution or supply of electricity to retail customers ~~and or~~ is legally charged with monitoring the operation of wholesale or retail markets serving retail suppliers or customers within its State or (ii) ~~an association or organization comprised exclusively of State public utility commissions described in the immediately preceding clause (i)~~ formed by States to act as a regional state committee as that concept is described in FERC’s Wholesale Market Platform White Paper.¹⁶

First, as discussed above in the ICC’s response to PJM’s proposed addition of Section 1.4A to the Operating Agreement, PJM’s proposed definition here would prevent a State public utility commission from being an Authorized Commission unless it both “regulates the distribution or supply of electricity to retail customers” and “is legally charged with monitoring the operation of wholesale or retail markets.” This requirement is overly limiting and may improperly screen out some state commissions and prevent them from receiving access to confidential PJM data. State commissions need data from PJM in order to oversee and regulate utility operations, monitor markets, and ensure reliable system operations within the new regional context created by the Commission’s progressive market policies. However, not all state commissions perform the functions of old-style traditional regulation and new-style market oversight in the same way and in the same combinations. By linking the two referenced clauses with the conjunctive “and” rather than “or,” PJM would prohibit those state commissions that do

¹⁶ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Appendix A, at 16 (April, 2003).

not perform both functions from accessing needed data. The ICC can perceive no reason for this unnecessary restriction.

Second, adoption of PJM's proposed definition would result in pre-deciding the allowable membership in a possible future PJM regional state committee. If the Commission accepts PJM's proposed definition of Authorized Commission, then the states in the PJM region would be required to limit membership in their future regional state committee only to state public utility commissions performing both of the functions discussed in the previous paragraph. State commissions would be prohibited from extending membership to a state commission providing one, but not the other of the two functions. Similarly, membership in the regional state committee could not be made available to state power siting agencies and other state agencies intimately involved in the regulation or oversight of the regional electric system. Such a prior restriction improperly ties the hands of state commissions as they debate whether to develop a regional state committee and consider what form that committee should take and the extent of its membership. The Commission's SMD White Paper clearly stated that the "structure and function" of each RSC shall be "determined by the states within the region."¹⁷ If the Commission accepts PJM's proposed Section 1.2, the proper deference that the SMD White Paper recommended be granted to each State with respect to regional state committee formation and membership would be effectively thrown out the window.

Section 1.4

Section 1.4 defines "Confidential Information." The ICC recommends that definition be modified as follows:

¹⁷ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Appendix A, at 16 (April, 2003) at page ??

Confidential Information. Any information that ~~would be considered~~ PJM determines through an established and filed legal process, and using established and filed legal criteria, to be non-public or confidential information under the Operating Agreement.

A responsibility should be placed on PJM, as an independent entity, to establish the criteria used to determine if information warrants confidential treatment. PJM should be directed to develop such criteria and submit them to FERC for inclusion in the PJM tariff. Under PJM's approach in Section 1.4, any entity would have the ability to get information treated as confidential simply by "considering" it to be confidential. Such a standard is no standard at all and such open-endedness goes against one of the core prerequisites of open and competitive markets—easy availability of transparent information. Accordingly, the Commission should direct PJM to develop criteria for designating information as confidential.

1.10 Third Party Request

Section 1.10 addresses "Third Party Requests." The ICC recommends that definition be modified as follows:

"Third Party Request" shall mean any request or demand by any entity upon an Authorized Person or an Authorized Commission for release or disclosure of confidential information provided to the Authorized Person or Authorized Commission by the Office of the Interconnection or PJM Market Monitor. A Third Party Request shall include, but shall not be limited to, any subpoena, discovery request, or other request for confidential information made by any: (1) federal, ~~state~~, or local governmental subdivision, department, official, agency or court, or (ii) arbitration panel, business, company, entity or individual. A Third Party Request shall not include requests from other state agencies, departments, or officials of the state represented by the Authorized Commission.

The ICC requests the changes set forth above be made to Section 1.10 of the Non-Disclosure Agreement for the same reasons that the ICC recommended these changes to Section 1.43A of the Operating Agreement, the provision addressing third party requests. We won't

repeat those here, but the ICC notes that what appears to be PJM's attempts to circumvent state legal requirements should not be rewarded with FERC approved revisions to the Operating Agreement.

Section 2.1

Section 2.1 imposes undue burdens upon Authorized Persons, to “represent and warrant” things that are not within that person's control and imposes undue burdens to “deny any Third Party Request and defend against any legal process which seeks the release of Confidential Information. . . .” The ICC protests these unrealistic excessive burdens upon the Authorized Persons and recommends that section be modified as follows:

Duty to Not Disclose. The Authorized Person represents and warrants that he or she: (i) is presently an Authorized Person as defined herein; (ii) is duly authorized to enter into and perform this Agreement; (iii) has ~~adequate~~ adequate procedures, consistent with the practices of the relevant Authorized Commission to protect against the release of Confidential Information, and (iv) is familiar with, and will comply with, all such applicable Commission procedures. ~~The Authorized Person hereby covenants and agrees on behalf of himself or herself to deny any Third Party Request and defend against any legal process which seeks the release of Confidential Information in contravention of the terms of this Agreement.~~

Similar to proposed Section 18.17.4(a)(i) of the Operating Agreement, this section places on the Authorized Person the burden to represent and warrant that he or she “has adequate procedures to protect against the release of any confidential information received.” Placing this burden on the Authorized Person is to misplace the burden. The Authorized Person, who, in many cases, may be a lower level staff technical person, is not in a position to represent and warrant that procedures are “adequate.” What does “adequate” mean and from whose perspective is the Authorized Person expected to assess “adequacy”? Why should the burden to make these legal determinations fall on a lower level technical staff person? It should be enough

to require the Authorized Person to represent and warrant that he or she is following the confidentiality practices of his or her State Commission. Similarly, this Section requires the Authorized Person to “covenant[s] and agree[s] on behalf of himself or herself to . . . defend against any legal process which seeks the release of Confidential Information in contravention of the terms of this Agreement.” Obligating the Authorized Person to “defend against any legal process which seeks the release of any Confidential Information” is a misplaced obligation. Once again, an Authorized Person may, in some cases, be a lower level technical staff person who just analyzes numbers. It would not be appropriate to place on such a staff person a burden to defend against legal processes.

Section 2.2

Section 2.2 also imposes excessively burdensome obligations on Authorized Commissions. Yet, as is made clear in the Preamble of the Non-Disclosure Agreement, the NDA is an agreement between PJM on the one hand and an Authorized Person on the other. Accordingly, the Non-Disclosure Agreement is not the proper place to impose conditions on Authorized Commissions. If these conditions are appropriate, they should be included in the Operating Agreement or the Form of Certification (as indeed they are--see, Section 18.17.4(a)(ii)) and deleted from the Non-Disclosure Agreement. The ICC, accordingly, recommends deletion of the entirety of Section 2.2. If the Commission decides not to delete Section 2.2 from the Non-Disclosure Agreement, the ICC recommends that section be modified as follows:

Conditions Precedent. As a condition of the execution, delivery and effectiveness of this Agreement by PJM and the continued provision of Confidential Information pursuant to the terms of this Agreement, the Authorized Commission shall, prior to the initial oral or written request for Confidential

Information by an Authorized Person on its behalf, provide PJM with: (a) a final order of FERC ~~prohibiting the release by the Authorized Person or the Commission of Confidential Information in accordance with the terms approving the addition of Section 18.17.4 to the Operating Agreement and this Agreement;~~ and (b) ~~either an order of the State Commission or a certification from counsel to the Commission, confirming that~~notice from the State Commission that it has statutory authority to protect the confidentiality of the Confidential Information from public release or disclosure and from release or disclosure ~~to any other entity,~~ and that it has ~~adequate~~ procedures or practices to protect against the release of Confidential Information; and (c) confirmation in writing that the Authorized Person is authorized by the State Commission to enter into this Agreement and to receive Confidential Information under the Operating Agreement. ~~PJM and the PJM Market Monitor shall be expressly entitled to rely upon such FERC and Commission orders and/or certifications of counsel in providing Confidential Information to the Authorized Person, and shall in no event be liable, or subject to damages or claims of any kind or nature hereunder or pursuant to the Operating Agreement, due to the ineffectiveness of the FERC and/or State Commission orders, or the inaccuracy of such certification of counsel.~~

First, the provision in this section that seeks to make state commissions subject to the FERC in the form of an Order from the FERC prohibiting a state commission from taking certain steps and engaging in certain actions is entirely inappropriate and unacceptable. As discussed above, the FERC has no jurisdiction over the state commissions, and FERC has no authority to direct the ICC's activities through such an order. While we will not repeat the argument in its entirety here, the ICC wishes to make clear that it protests PJM's attempts to circumvent state laws by seeking to force state commissions to obtain an Order from FERC preempting state laws in place to protect against the very gaming and unlawful practices that state access to confidential market data seeks to achieve.

Finally, the ICC reiterates that the requirement in clause (c) of PJM's proposed paragraph above would require an Authorized Commission to provide PJM with "confirmation in writing that the Authorized Person is authorized by the State Commission to enter into the Non-Disclosure Agreement and to receive confidential information under the Operating Agreement."

However, this requirement is unnecessary in this place. The Form of Certification (PJM's proposed Schedule 10A) includes an Exhibit A that is the list of the Authorized Commission's designated Authorized Persons. The Form of Certification specifies a procedure for completing and updating the list in Exhibit A. The additional confirmation requested in PJM's proposed Section 2.2, is unnecessary and potentially confusing and conflicting.

For all these reasons, the ICC recommends that the Commission direct PJM to modify Section 2.2 as stated above.

Section 2.3

Section 2.3 permits an Authorized Person to discuss confidential information with another Authorized Person provided that they both have requested and received the same information from PJM. The ICC recommends that section be modified as follows:

Discussion of Confidential Information with other Authorized Persons. The Authorized Person may discuss Confidential Information with other Authorized Persons who are parties to non-disclosure agreements containing the same or similar terms and conditions as this Agreement; ~~provided, however, that PJM shall have confirmed in advance and in writing that PJM has previously released the Confidential Information in question to such Authorized Persons. PJM shall respond to any written request for confirmation within two (2) business days of its receipt.~~

This provision is similar to Section 18.17.4(a)(v) and suffers from the same deficiencies discussed above concerning that section. In particular, PJM's proposal would prevent one Authorized Person from discussing confidential information with another Authorized Person unless both had requested and received from PJM the same confidential information. Under PJM's proposed approach, not only would an Authorized Person be prohibited from discussing confidential information with another Authorized Person in another State commission, but the

Authorized Person would be prohibited from discussing confidential information with any colleague in his or her own State commission who is an Authorized Person and otherwise eligible to receive confidential information unless each Authorized Person has requested and received from PJM the same confidential information. The un-workability of PJM's proposed approach was described above in the scenario of Authorized Persons A and B, in which only after Authorized Person B has received the requested information from PJM and PJM has provided confirmation of that fact to Authorized Person A (such confirmation possibly taking up to two additional business days) could Authorized Person A and Authorized Person B begin to discuss the confidential information. This proposed process is unnecessarily lengthy and burdensome.

Indeed, as we said above, PJM's proposal appears primarily designed to hinder and delay the effective use of confidential information by an Authorized Person and is not in the spirit of good faith process. The ICC recommends that the Commission reject PJM's approach and permit unrestricted contact between Authorized Persons.

Finally, Section 2.3 does not specify whether its restrictions on the ability of one Authorized Person to discuss confidential information with another Authorized Person applies to information conveyed by PJM under the oral disclosure provisions of Section 18.17.4(b) or just to the written disclosure provisions of Section 18.17.4(c). If the Commission permits the restrictions to apply at all, the Commission should require PJM to clarify that they do not apply to oral disclosures under Section 18.17.4(b).

Section 2.4

Section 2.4 requires Authorized Persons to defend against Third Party Requests. Similar to Section 2.1 of the NDA and Section 18.17.4(a)(ii) of the Operating Agreement, this Section

requires the Authorized Person to “defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process.” As described above, obligating the Authorized Person to manage legal processes to defend against disclosure to third parties is to misplace the obligation. Once again, an Authorized Person may, in some cases, be a lower level technical staff person who just analyzes numbers. It would not be appropriate to place on such a staff person a burden to defend against legal processes. Accordingly, the ICC recommends deletion of this section, in its entirety, from the NDA.

However, despite these arguments, if the Commission decides to retain Section 2.4 in the NDA, the ICC recommends that section be modified as follows:

Defense Against Third Party Requests. ~~The Authorized Person shall defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders.~~ The Authorized Person Commission shall provide PJM, and PJM shall provide each Affected Member, with prompt notice of any ~~such~~ Third Party Request or legal proceedings, and shall ~~consult~~cooperate with PJM ~~and/or any Affected Member in its efforts to deny the request or defend against such legal process~~in this regard. In the event a protective order or other remedy is denied, the Authorized ~~Person~~Commission agrees to furnish only that portion of the Confidential Information which ~~their~~ legal counsel advises PJM (and of which PJM shall, in turn, advise any Affected Members) ~~in writing~~ is legally required to be furnished, and to exercise ~~their~~ its best efforts to obtain assurance that confidential treatment will be accorded to such Confidential Information.

The proposed language in Section 2.4 seeks to make Authorized Persons and State commissions responsible for representing and protecting the interests of PJM and its market participants against third party requests. This is another example of a misplaced obligation by PJM. As discussed above, such a responsibility should properly fall on PJM and its market participants, to the extent they believe they may be injured.

Furthermore, the ICC believes that PJM's proposed language places an unreasonable burden on the state commission in the event a protective order or other remedy is denied. PJM's proposed the following language within Section 2.4:

In the event a protective order or other remedy is denied, the Authorized ~~Person~~Commission agrees to furnish only that portion of the Confidential Information which ~~their legal counsel advises PJM (and of which PJM shall, in turn, advise any Affected Members) in writing~~ is legally required to be furnished, and to exercise ~~their~~ its best efforts to obtain assurance that confidential treatment will be accorded to such Confidential Information.

Requiring the state commission to advise PJM of the outcome of the proceeding is excessive. PJM should have its own legal counsel to advise it of the outcome of legal proceedings. Again, the ICC believes that this language is another attempt by PJM to push its responsibilities onto the state. Once the state commission informs PJM of the matter, PJM should stand up and take its own responsibility. While the ICC agrees that it is reasonable to furnish only that portion of the Confidential Information is legally required to be furnished, PJM's proposal essentially requires the state commission to update and advise PJM in writing of the status and outcome of pending legal matters. This should not be the state commission's responsibility. The state commission will abide by the legal outcome of such a proceeding, but PJM should have its own legal counsel to inform it of the actual legalities of the relevant proceedings.

Given these multiple concerns with Section 2.4, the ICC recommends that the Commission direct PJM to delete the section from the NDA. To the extent the language in Section 2.4 is not deleted entirely, it would more properly be placed in the Form of Certification, rather than the NDA. If neither of these recommendations is adopted, then, at a minimum, Section 2.4 should be modified as illustrated above.

Section 2.5.2

Section 2.5.2 establishes conditions under which one Authorized Person may disseminate confidential information to another Authorized Person.

Access to Confidential Information. The Authorized Person shall ensure that Confidential Information received by that Authorized Person is disseminated only to those persons publicly identified as Authorized Persons on Exhibit “A” to the certification provided by the State Commission to PJM.

While Section 2.5.2 addresses the “dissemination” of confidential information between Authorized Persons and Section 2.3 addresses the “discussion” of confidential information between Authorized Persons, it appears that these two sections, as written, contradict or are incompatible. Recall that Section 2.3 requires Authorized Person A to obtain confirmation from PJM that Authorized Person B has requested and received the same confidential information as Authorized Person A before the two can discuss the information. Does Section 2.5.2 permit Authorized Person A to “disseminate” to Authorized Person B confidential information that Authorized Person A has received from PJM, while Section 2.3 prevents Authorized Person A from discussing that information with Authorized Person B? If that’s what the language provides for, that approach seems to make little sense.

The solution to these inconsistencies, as proposed by the ICC and discussed above in response to PJM’s proposed Section 2.3, is to permit any Authorized Person to disseminate confidential information to and discuss confidential information with any other Authorized Person.

Section 2.5.3(i)

Section 2.5.3(i) imposes an obligation on each Authorized Person to inform PJM of changes in employment status. The ICC recommends that this Section be deleted in its entirety from the NDA because it is an unnecessary invasion of privacy and conflicts with internal employment rules and regulations. Under general business practices, internal personnel matters are considered private and confidential. It is entirely inappropriate for PJM to attempt to impose upon state employees and the state commission the burden of disclosing internal personnel matters. The ICC recommends an alternative approach to notifying PJM of a change in Authorized Person status. The ICC suggests that an Authorized Person or Authorized Commission may simply inform PJM that the Authorized Person or Authorized Commission is withdrawing the status of that Authorized Person as an “Authorized Person” on behalf of a particular commission. It is unnecessary to inform PJM of any reason why an Authorized Person no longer wishes to be considered an Authorized Person. In the view of the ICC, this alternative approach accomplishes the same goal as the PJM proposal without jeopardizing or prejudicing the state commission. Employment matters are internal within the agency, and the state commission should not have to inform PJM of every internal employment decision. Imposing such an obligation on the states and their employees violates sound public policy and general business practices.

Furthermore, Section 2.d.i of the proposed Form of Certification places the obligation to inform PJM of Authorized Persons’ employment status on the Authorized Commission. If the Commission decides not to delete Section 2.5.3.i, the ICC recommends that section be modified as follows:

(i) The Authorized ~~Person~~ Commission shall promptly notify PJM of any change ~~or termination of employment or agency~~ that would affect the Authorized Person's status as an Authorized Person, and in such event shall request, in writing, deletion from the schedule referred to in section (ii), below.

It is completely unnecessary to require any further explanation beyond notifying PJM of any change in status of the designation of Authorized Person. In fact, the ICC believes that to do so would chill any employee involvement in this process. The ICC recommends that Section 2.5.3.i should be modified as proposed above.

Section 2.5.4

Section 2.5.4 restricts how an Authorized Person may use confidential information in assisting his/her Authorized Commission. The ICC recommends that section be deleted in its entirety as follows:

~~**Use of Confidential Information.** The Authorized Person shall use the Confidential Information solely for the purpose of assisting the Commission in discharging its legal responsibility to monitor the wholesale and retail electricity markets, operations, transmission planning and siting and generation planning and siting materially affecting retail customers within the State, and for no other purpose.~~

It is the ICC's position that it is entirely inappropriate for PJM to dictate and control how a State Commission uses information in its possession. It should be more than sufficient for PJM to receive commitments from the State Commissions that commercially sensitive information will not be disclosed to the public. This is of paramount concern. However, PJM's proposed Section 2.5.4 would dictate, in detail, restrictions such as the State Commission's "legal responsibility." Read literally, a State Commission would be permitted to use confidential information in monitoring efforts, for example, but would not be permitted to use such information to assist in setting rates, for example, or service quality standards. Such restrictions

are entirely inappropriate. As stated previously, it is the ICC's position that imposing conditions to ensure that commercially sensitive information will not be disclosed to the public is entirely appropriate. However, dictating how State Commissions use information is entirely outside the proper bounds of RTO authority and has no place in a FERC-filed tariff. Accordingly, Section 2.5.4 should be deleted.

Section 2.5.5

Section 2.5.5 establishes conditions for the return of confidential information to PJM.

The ICC recommends that section be modified as follows:

Return of Confidential Information. ~~Upon completion of the inquiry or investigation referred to in the Information Request~~ When the Authorized Commission determines that it no longer needs the Confidential Information that it has received, or for any reason the Authorized Person is, or will no longer be an Authorized Person, the Authorized ~~Person~~ Commission shall (a) return the Confidential Information and all copies thereof to PJM, or (b) provide a ~~certification notice that the Authorized Person has destroyed~~ certification notice that the Confidential Information has been destroyed and ~~deleted~~ have been deleted all electronic copies of the Confidential Information have been deleted. PJM ~~may~~ shall waive this condition in writing if such Confidential Information has become publicly available or non-confidential in the course of business or pursuant to tariff, rule or order of the FERC.

First, this section implies that there must have been a formal "inquiry or investigation" in order for there to have been an Information Request submitted. That implication is not accurate. Section 1.6 of the NDA defines "Information Request as "a written request, in accordance with the terms of this Agreement for disclosure of Confidential Information pursuant to Section 18.17.4 of the Operating Agreement." Similarly, Section 18.17.4(c)(i), which specifically addresses information requests, only requires a requestor to provide a description of the information that is sought and state a purpose for requesting the information. Accordingly, the reference in Section 2.5.5 to an "inquiry or investigation" is not accurate and should be deleted.

Second, there is no reason for PJM's tariff to restrict the length of the period of time that confidential information resides with an Authorized Commission. Rather, the Authorized Commission should be permitted to retain that confidential information for as long as necessary for the purposes of the Authorized Commission.

Third, it would be more practical for PJM to place the responsibility for returning or destroying confidential information on the Authorized Commission rather than the Authorized Person. As was explained above, after an Authorized Person has quit State Commission employment, that person would have little concern for what happens to the mounds of paper left behind in file cabinets or files left on hard-drives. However, because the State Commission will need to manage an ongoing relationship with PJM, the State Commission will have an interest in making sure all loose ends are tied up. For these practical reasons, the ICC recommends that the "Authorized Persons" be changed to "Authorized Commissions" in this section.

Finally, if Confidential Information has become "publicly available or non-confidential," the obligations to return or destroy that information should automatically be waived. Section 2.5.5 provides PJM with the option not to waive such requirements under such conditions. That option to waive should be made mandatory as proposed by the ICC.

Section 3.1

Section 3.1 describes the proposed process for written Information Requests. The ICC recommends that Section 3.1 be deleted from the Non-Disclosure Agreement because it duplicates proposed Section 18.17.4(c)(i) in the Operating Agreement. If Section 3.1 is not deleted in its entirety, the ICC recommends that the section be modified as follows in the same way as the ICC recommended that Section 18.17.4(c)(i) be modified:

Written Requests. Information Requests to PJM shall be in writing, which shall include electronic communications, addressed to the PJM Market Monitor or other PJM representatives as specified by PJM, with a concurrent copy to PJM's General Counsel, and shall: ~~(a) describe with particularity the information sought; (b) provide a description of the purpose of the Information Request; (c) state the time period for which information is requested; and (d) re-affirm that only the Authorized Person shall have access to the Confidential Information requested.~~ PJM shall provide an Affected Member with written notice, which shall include electronic communication, of an Information Request of the Authorized Person as soon as possible, but not later than two (2) business days after the receipt of the Information Request.

Section 3.1 of PJM's proposed NDA is practically identical to proposed Section 18.17.4(c)(i) in the Operating Agreement. As explained in the ICC's discussion of that Section above, Section 3.1 here suffers from the following four flaws.

First, PJM's April 29 filing provides no explanation for why the information sought by an Authorized Requestor would need to be identified "with particularity." Furthermore, the "with particularity" standard is not defined. The ICC is concerned that PJM could use the "with particularity" requirement to reject Information Requests that PJM might not want to respond to. Furthermore, it will be in the best interests of the Authorized Requestor to make clear with particularity in its Information Request exactly what information is being sought from PJM. However, allowing that standard to be a mandatory threshold in PJM's tariff provides PJM with weapon to block State commissions' access to needed information. Accordingly, the ICC recommends deletion of the phrase "with particularity."

Second, PJM's April 29 filing provides no explanation for why an Authorized Commission and an Authorized Requestor should be required to provide to PJM a "description of the purpose of the Information Request." To the extent that an Authorized Requestor wishes to voluntarily provide PJM with a description of the purpose for which the information is sought so as to assist PJM in better providing the sought-for information, then the Authorized Requestor

should not be prohibited from stating the purpose. However, allowing PJM's tariff to mandate that the Authorized Person state the purpose of the Information Request is to put the State commission at a disadvantage in performing its duties. Accordingly, the ICC recommends deletion of the clause requiring a description of the purpose of the Information Request.

Third, PJM's April 29 filing provides no explanation for why PJM needs upfront information about "the time period for which confidential information is requested" in order to provide the Authorized Requestor with information that is being sought. Would PJM's response to the data request be different if the Authorized Requestor states a desire to retain the information for two years rather than two weeks? Furthermore, if the clause is intended to be applicable to the historical time period for the events being asked about in the Information Request, e.g., the month of June, 2003, rather than the time forward period for which the Authorized Requestor is seeking to retain the information, then the language is not clear in this regard. Finally, if the purpose of the clause is to apply to an historic period, there is no reason to include this requirement in the tariff because it will be in the best interests of the Authorized Requestor to clearly state the historical period for which data is sought. In any event, the ICC recommends deletion of the clause requiring the Authorized Requestor to specify "the time period for which confidential information is requested."

Finally, PJM's April 29 filing provides no explanation for why it is necessary to require an Authorized Person to "re-affirm that only the Authorized Person shall have access to the confidential information requested" each time the Authorized Person makes an Information Request. PJM will already have in hand a signed Non-Disclosure Agreement from the Authorized Requestor and a signed Certification from the Authorized Commission. What could requiring a re-affirmation each time an Information Request is submitted possibly add to this?

Furthermore, as to the substance, the ICC opposes the restriction of information access only to the Authorized Requestor who made the Information Request. It is the ICC's position that any Authorized Requestor should be able to discuss confidential information with any other Authorized Requestor. Accordingly, the ICC recommends deletion of the clause requiring re-affirmation as burdensome and unnecessary.

Section 3.2

Section 3.2 describes the proposed process for oral discussions of confidential information with the PJM Market Monitor or other PJM representative. The ICC recommends that Section 3.2 be deleted from the Non-Disclosure Agreement because it duplicates proposed Section 18.17.4(b) in the Operating Agreement. If Section 3.2 is not deleted in its entirety, the ICC recommends that the section be modified as follows in the same way as the ICC recommends that Section 18.17.4(b) be modified:

Oral Disclosures by the PJM Market Monitor. The PJM Market Monitor or other PJM representatives as specified by PJM may, in the course of discussions with an Authorized Person, orally disclose information otherwise required to be maintained in confidence, without the need for a prior Information Request. Such oral disclosures shall provide enough information to enable the Authorized Person or the State Commission to determine whether additional Information Requests for information are appropriate. The PJM Market Monitor or other PJM representative will not make any written or electronic disclosures of Confidential Information to the Authorized Person pursuant to this section. In any such discussions, the PJM Market Monitor or other PJM representative shall ensure that the individual or individuals receiving such Confidential Information are Authorized Persons under this Agreement, orally designate Confidential Information that is disclosed, and refrain from identifying any specific ~~market participant~~ Affected Member whose information is disclosed. The PJM Market Monitor or other PJM representative shall also be authorized to assist Authorized Persons in interpreting Confidential Information that is disclosed. PJM or the PJM Market Monitor shall (i) maintain a written record of oral disclosures pursuant to this section, which shall include the date of each oral disclosure and the Confidential Information that is disclosed in each such oral disclosure, and (ii) provide any Affected Member with ~~oral~~ notice of any oral disclosure

immediately, but not later than one (1) business day after the oral disclosure. Such ~~oral~~ notice to the Affected Member shall include the substance of the oral disclosure, but shall not reveal any Confidential Information of any other Member ~~and must be received by the Affected Member before the name of the Affected Member is released to the Authorized Person;~~ provided however, the identity of the Affected Party must be made to the Authorized Person within two (2) business days of the initial oral disclosure.

Section 3.2 of PJM's proposed NDA is very similar to proposed Section 18.17.4(b) in the Operating Agreement. As explained in the ICC's discussion of that Section above, Section 3.2 here suffers from the following three flaws.

First, it is the ICC's position that PJM's proposal to shield for several days the identity of the entity whose information is orally disclosed to an Authorized Person under the provisions of this section is not in keeping with the spirit of providing State commissions with access to confidential information that they need in a timely way to perform their duties. Moreover, however, PJM's use of the term "market participant" in Section 3.2, rather than "Affected Member," significantly expands the blanket of protection from disclosure that PJM would be providing. Affected Members are a subset of the much larger undefined category of market participants. PJM owes a certain duty of care for Affected Members under the Operating Agreement that PJM does not owe to market participants who are not PJM Members. Accordingly, the Commission should direct that the term "market participant" in Section 3.2 be changed to "Affected Member."

Second, there is no apparent reason to limit the manner in which PJM is required to give notice to the Affected Member that confidential information associated with that Affected Member was disclosed by PJM in the oral discussions with Authorized Persons. Section 3.2 would prohibit PJM from providing written notice, for example, to Affected Members. PJM's April 29, 2004 filing offers no explanation for why such restrictions are needed.

Finally, the clause that mandates that the notification of the oral disclosure be received by the Affected Member before its identity is revealed and the clause that mandates that the identity must be disclosed within two business days are contradictory. Furthermore, placing on PJM the burden to ensure that the Affected Member “receives” notice of the oral disclosure of confidential information is to misplace the burden. If the Commission accepts this provision in Section 3.2, it should be sufficient to place on PJM the burden of providing notification, rather than ensuring that an Affected Member received the notice. In any event, the ICC recommends that the Commission direct PJM to delete the provision concerning receipt of the notice by the Affected Member.

For all these reasons, the ICC recommends that if Section 3.2 is not deleted in its entirety from the NDA, then the Commission should direct PJM to modify Section 3.2 as stated above.

Section 3.3.1

Section 3.3.1 describes the process for PJM to respond to Information Requests. The ICC recommends that Section 3.3.1 be deleted from the Non-Disclosure Agreement because it duplicates proposed Section 18.17.4(c)(ii) in the Operating Agreement. If Section 3.3.1 is not deleted in its entirety, the ICC recommends that the section be modified as follows in the same way as the ICC recommends that Section 18.17.4(c)(ii) be modified:

Subject to the provisions of Section 3.3.2 below, PJM shall supply Confidential Information to the Authorized Person in response to any Information Request within the time period specified in the Information Request, but in no event more than five (5) business days of after the receipt of the Information Request, to the extent that unless the requested Confidential Information can only reasonably be made available within such an extended time period; provided, however, that in no event shall Confidential Information be released prior to the end of the fourth (4th) business day without the express consent to the Affected Member. To the extent that PJM cannot reasonably prepare and deliver the requested Confidential

Information within the time frame specified in the Information Request or such the five (5) day period, PJM shall, within such period, hold discussions with the Authorized Person and provide the Authorized Party Person with an agreed-upon written schedule for the provision of such remaining Confidential Information. Upon providing Confidential Information to the Authorized Person, PJM shall either provide a copy of the Confidential Information to the Affected Member(s), or provide a listing of the Confidential Information disclosed; provided, however, that PJM shall not reveal any Member's Confidential Information to any other Member.

Section 3.3.1 of PJM's proposed NDA is very similar to proposed Section 18.17.4(c)(ii) in the Operating Agreement. As explained in the ICC's discussion of that Section above, Section 3.3.1 here suffers from the following two flaws.

First, to the extent it is reasonable, PJM should be obligated to provide the information sought by the Authorized Requestor in the time frame requested by the Authorized Requestor. The ICC's proposed modifications would accomplish this result by establishing that information will be provided in the time frame requested (or five days) unless it would not be reasonably possible for PJM to comply with the request within that time frame. In such cases, the ICC recommends that PJM be required to negotiate an appropriate response schedule with the Authorized Person.

Second, as the ICC recommended above in response to Section 18.17.4(c)(iii) the objection and appeal process provided by PJM in proposed Section 18.17.4(c)(iii) should not be available to Affected Members. Therefore, there is no reason to include the 4-day delay proposed in this section to allow an Authorized Member time and opportunity to exercise the objection option. Accordingly, the ICC recommends that the 4-day provision be deleted from Section 3.3.1 as proposed above.

Section 3.3.2

Section 3.3.2 establishes provisions for PJM or an Affected Member to object to an Information Request and appeal to the Commission. The ICC recommends that Section 3.3.2 be deleted from the Non-Disclosure Agreement because it duplicates proposed Section 18.17.4(c)(iii) in the Operating Agreement. If Section 3.3.2 is not deleted in its entirety, the ICC recommends that the section be modified as follows in the same way as the ICC recommended that Section 18.17.4(c)(iii) be modified:

Notwithstanding section 3.3.1, above, should PJM ~~or an Affected Member~~ object to an Information Request or any portion thereof, PJM ~~or the Affected Member~~ may, within four (4) business days following PJM's receipt of the Information Request, request, in writing, a conference with the State Commission or the State Commission's authorized designee to resolve differences concerning the scope or timing of the Information Request; provided, however, nothing herein shall require the State Commission to participate in any conference. ~~Any~~ Either party to the conference may seek assistance from FERC staff in resolution of the dispute. Should such conference be refused by ~~any either~~ participant, or not resolve the dispute, then PJM, ~~the Affected Member~~ or the State Commission may initiate appropriate legal action at FERC within three (3) business days following receipt of written notice from ~~any conference participant~~ the Authorized Commission refusing or terminating such conference. Any complaints filed at FERC objecting to a particular Information Request shall be designated by the party as a "fast track" complaint and ~~each party~~ PJM shall bear its own costs and those of the State Commission in connection with such FERC proceeding. If no FERC proceeding regarding the Information Request is commenced by PJM, ~~the Affected Member~~ or the State Commission within such three day period, PJM shall ~~utilize its best efforts to~~ respond to the Information Request promptly within four (4) business days of PJM's receipt of notice from the Authorized Commission refusing a proffered conference or from either party's issuance, or FERC issuance, of notice terminating a conference. Should either the Office of the Interconnection or the Authorized Commission have initiated a FERC proceeding to resolve a dispute, and the Authorized Commission prevailed, then the Office of the Interconnection shall provide the information requested by the Authorized Commission within one (1) business day of the FERC's issuance of findings. Should an objection covered by this section only apply to a portion of an Information Request and not to its entirety, then the Office of the Interconnection shall respond to the portion not objected to.

Section 3.3.2 of PJM's proposed NDA is very similar to proposed Section 18.17.4(c)(iii) in the Operating Agreement. As explained in the ICC's discussion of that Section above, Section 3.3.2 here suffers from the following flaws.

First, the objection provisions of this Section 3.3.2 should not be available to Affected Members as the language in the Section provides. By its own terms, Section 3.3.2 allows for objections to "resolve differences concerning the scope or timing of the Information Request." An Affected Member has no standing to object to the "scope or timing" of an Information Request. Scope or timing issues with an Information Request may well affect PJM and PJM's ability to timely respond to the Information Request. However, Affected Members are not affected by the scope or timing of an Information Request because the Information Request, by definition, can apply only to information already in the possession of PJM or the PJM Market Monitor. Accordingly, for this reason, PJM might fairly be accorded rights to object to an Information Request and rights to appeal to FERC. However, Affected Members have no grounds to object to an Information Request on the basis of scope or timing.

If it is argued that, despite the plain language of Section 3.3.2 limiting objections to scope or timing issues (about which Affected Members have no standing), Affected Members should have rights to object to Information Requests and to appeal to FERC, the ICC disagrees. After all, the information at issue in Section 3.3.2 is information that is in the possession of PJM or the PJM Market Monitor as a consequence of those entities' duties to operate a regional transmission grid and administer a regional power market. Those RTO duties could not have evolved and developed without the forbearance or assistance of State legislatures and State commissions in efforts to move the electric industry from one where customers are protected through comprehensive regulation to one where customers are principally protected by the

workings of competitive markets. Unlike State Commissions, not all Affected Members have sincere interests in seeing that competitive markets operate efficiently and fairly. Accordingly, the Commission needs to consider carefully the consequences of providing rights to Affected Members to object to and appeal Information Requests submitted to RTOs by State Commissions. The ICC urges the Commission not to create such rights for Affected Members.

Furthermore, given that PJM's proposal seeks to require a State Commission to sign a detailed certification attesting in numerous ways to its ability and intention to keep confidential PJM data confidential and that each Authorized Requestor is required to sign a detailed Non-Disclosure Agreement promising the same, it is prudent to question the motives of Affected Members attempting to create a right to object to Information Requests by Authorized Persons and a right to appeal PJM's decisions concerning those Information Requests to FERC. This reluctance to facilitate oversight of competitive markets provides a very strong reason why State Commissions should receive timely access to confidential RTO information and for the FERC to ensure that undue roadblocks are not thrown up to prevent broad and timely access by State Commissions to confidential RTO information. Accordingly, the ICC recommends that the Commission modify Section 3.3.2 as recommended above so that Affected Members do not have objection rights and appeal rights with regard to decisions made by PJM about responses to Information Requests from Authorized Persons.

Second, PJM's proposal would have the Authorized Commission bear its own costs if PJM or an Affected Member wishes to appeal to FERC in an effort to avoid providing an Authorized Person with the information requested by an Authorized Person. Imposing such costs on an Authorized Commission appears to be yet another means to discourage State Commissions from making information requests to PJM. A State Commission will not even

consider making certain types of information requests under these arrangements if there is a very real possibility that the State Commission might be dragged through lengthy and expensive administrative proceedings at FERC. The ICC recommends that, if an appeal option is approved by the Commission, such approval be provided only on the condition that PJM will bear both its own costs and those of the State Commission when appeals of information requests are made to FERC.

Third, PJM's proposed language leaves open PJM's response deadline in cases where no FERC proceeding is initiated. Rather, PJM commits only to respond "promptly." The ICC recommends that, the commitment to respond promptly be changed to a commitment to respond "within four (4) business days of PJM's receipt of notice from the Authorized Commission refusing a proffered conference or from either party's issuance, or FERC issuance, of notice terminating a conference." Four days after the termination of the conference or, if no conference is initiated, four days after PJM receives notice from the state commission refusing the conference equals one day after PJM's deadline to decide if it wants to dispute the matter in a FERC proceeding. At that point, PJM will have had the information request in hand for at least nine days, and far longer if a conference was held. Further delay would be unwarranted.

Similarly, PJM's proposal leaves entirely open-ended PJM's response deadline in cases where either PJM or the Authorized Commission initiated a FERC proceeding to resolve a dispute, and the Authorized Commission prevailed. The ICC recommends that, in such cases, PJM should be required to provide the information requested by the Authorized Commission within one (1) business day of the FERC's issuance of findings. Failure to do so should result in enforceable penalties.

Finally, the ICC recommends addition of the final sentence in the passage above addressing cases where only a portion of an Information Request is subject to an objection. In such cases, the portion of the Information Request that is not the subject of the objection should not get rolled into the appeals process.

Section 4.1

Section 4.1 addresses breaches of the Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

Material Breach. The Authorized Person agrees that release of Confidential Information to persons not authorized to receive it constitutes a breach of this Agreement ~~and may cause irreparable harm to PJM and/or the Affected Member.~~ A breach shall be determined to have occurred if both PJM and the Authorized Commission agree that a breach has occurred or FERC has determined that a breach has occurred. In the event of a breach of this Agreement by the Authorized Person, ~~PJM shall terminate this Agreement upon written notice to the Authorized Person and his or her Authorized Commission, and all rights of the Authorized Person hereunder shall thereupon terminate; provided, however, that PJM may restore an individual's status as an Authorized Person after consulting with the Affected Member and to the extent that: (i) PJM determines that the disclosure was not due to the intentional, reckless or negligent action or omission of the Authorized Person; (ii) there were no harm or damages suffered by the Affected Member; or (iii) similar good cause shown~~ the Authorized Commission shall review the designation as an Authorized Person of the Authorized Person who committed the breach. Any appeal of PJM's the Authorized Commission's findings or actions in the review process under this section shall be to FERC.

First, PJM's proposed language would effectively force an Authorized Person to attest as a fact that release of confidential information "may cause irreparable harm to PJM and/or an Affected Member." Given that an Authorized Person simply will not be in a position to attest to that statement as a fact, this phrase should be deleted from the NDA.

Second, as explained elsewhere in these Comments, a situation should not be determined to be a breach just because PJM declares it to be so. PJM's allegation of a breach is just that—an

allegation—until such time as the Authorized Commission agrees that a breach has occurred or until such time as a proper authority, such as FERC or a court, has determined a breach to have occurred.

Finally, as explained above in response to PJM’s proposed Section 18.17.4(d)(ii) of the Operating Agreement, it is not appropriate for PJM to acquire the type of authority over State commission staff persons’ job activities that Section 4.1 would provide to PJM. Neither would it be appropriate for FERC to grant such authorization to PJM. In the event that (1) both PJM and the Authorized Commission agree that a breach has occurred; or (2) FERC has found a breach to have occurred, it would be appropriate for the Authorized Commission to initiate a review to assess whether or not the Authorized Person who committed the breach should be entitled to remain on that Commission’s list of Authorized Persons. The ICC’s proposed modification above to Section 4.1 would require the Authorized Commission to initiate that review. The ICC recommends that FERC direct PJM to make this modification.

Section 4.2

Section 4.2 provides appeal rights in cases of alleged breach of the Non-Disclosure Agreement. The ICC recommends that section be modified as follows:

Judicial Recourse. In the event of any breach of this Agreement, PJM ~~and/or the Affected Member~~ shall have the right to seek and obtain at least the following types of relief: (a) an order from FERC requiring any breach to cease ~~and preventing any future breaches~~; (b) temporary, preliminary, and/or permanent injunctive relief with respect to any breach found by FERC; and (c) to the extent that both PJM and the Authorized Commission agree that a breach has occurred or FERC has made a ruling that a breach has occurred, the immediate return to PJM of all Confidential Information in the custody of the Authorized Person found to have committed the breach to PJM. The Authorized Person expressly agrees that in the event that both PJM and the Authorized Commission agree that a breach of this Agreement has occurred or FERC has made a ruling that a breach has occurred ~~of a breach of this Agreement~~, any relief sought ~~properly may~~

includes, but shall not be limited to, the immediate return of all Confidential Information in the custody of the Authorized Person found to have committed the breach to PJM.

First, because the Non-Disclosure Agreement will be an agreement between PJM, on the one hand, and an Authorized Person on the other hand, it would not be appropriate to grant an Affected Member the appeal rights set forth in this Section. Accordingly, the ICC recommends that deletion of reference to Affected Members in this section.

Second, imposing an obligation on FERC to issue an Order “preventing any future breaches” is to ask too much of FERC. It is reasonable to expect FERC to issue Orders, if necessary, directing that tariff language be complied with. FERC would be in a position to enforce such Orders. However, it is not in FERC’s capability, or in the capability of any administrative agency to absolutely “prevent any future breaches.” Accordingly, the ICC recommends deletion of that phrase from this section.

Third, a breach can be considered to have occurred only if both PJM and the Authorized Commission agree that a breach has occurred or if FERC has ruled that a breach has occurred. Until then, the situation can only be called an alleged breach. The ICC’s proposed modifications to Section 4.2 above will clarify this point.

Finally, the obligation to return confidential information to PJM should be limited to the Authorized Person who has been found to have committed a breach. It should not apply to all confidential information at a particular Authorized Commission. The ICC’s proposed modifications to Section 4.2 above will clarify this point.

Section 4.3

Section 4.3 addresses the monetary damages that Authorized Persons are subject to. The ICC recommends that section be modified as follows:

Waiver of Monetary Damages. No Authorized Person shall have responsibility or liability whatsoever under this Agreement for any and all liabilities, losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with the release of Confidential Information to persons not authorized to receive it, provided that such Authorized Person is an employee or member of, or agent of an Authorized Commission at the time of such unauthorized release. Nothing in this Section 4.3 is intended to limit the liability of any person who is not an employee of or a member of an Authorized Commission, or agent thereto, at the time of such unauthorized release for any and all economic losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with such unauthorized release.

The effect of the last sentence of this Section of PJM's proposal would be to make the Authorized Commission's contractors, consultants, and outside counsel fully subject to liability arising out of the Non-Disclosure Agreement. This kind of liability exposure would have a chilling effect on such entities and unreasonably impact a State Commission's options in deciding how it gets its work done, e.g., utilizing internal employees or consultants. Accordingly, the ICC recommends that this section be modified as proposed above.

Section 6

Section 6 provides for Notices. The ICC recommends that section be modified as follows:

Notices. All notices required pursuant to the terms of this Agreement shall be in writing, and served upon the ~~Parties in~~ following persons, or at the following addresses or email addresses:

[Section 6 then goes on to provide some blanks for "the Authorized Person" and some addresses for PJM's Market Monitor and General Counsel.]

First, it should be noted that the Preamble of the Form of Non-Disclosure Agreement specifically defines "Parties" as PJM and "The State Commission." However, the Preamble of the Form of Non-Disclosure Agreement also states that the agreement will be between PJM and

an Authorized Person. Section 6—the Notice section—requires notices to be served on Authorized Persons, as is appropriate, but it refers to these Authorized Persons as “Parties.” This is not correct. As an aside, the ICC notes that this same problem occurs in the last paragraph of the Recitals section of the Form of Non-Disclosure Agreement. The ICC’s proposed modification to Section 6 would address the problem caused by PJM’s unclear and contradictory use of the term “Parties.” An alternative way to correct the problem would be to redefine the definition of “Parties” in the Preamble to refer to “Authorized Persons” rather than “the State Commission.”

Second, Section 6 specifies that notice must be provided to PJM’s Market Monitor and PJM’s General Counsel. However, Section 18.17.4(c)(i) permits Authorized Persons to submit Information Requests to “other designated representative[s] of the Office of the Interconnection.” Similarly, Section 3.1 of the Form of Non-Disclosure Agreement provides for the submission of Information Requests to “other PJM representatives as specified by PJM.” However, no other PJM representatives have been specified by PJM in the documents filed by PJM on April 29, 2004. Accordingly, the ICC recommends that the Commission require PJM to identify in the Notice section who these “other PJM representatives” are or, alternatively (and preferably), delete from Section 3.1 and Section 18.17.4(c)(i) the language that asserts that only “designated” PJM representatives or those “specified by PJM” may be requested by Authorized Persons to provide confidential information.

Section 8

Section 8 requires and Authorized Person to make representations. The ICC recommends that section be modified as follows:

Representations. The undersigned represent and warrant that they are ~~vested with all necessary corporate, statutory and/or regulatory authority to execute and deliver this Agreement, and to~~ able to perform all of the obligations and duties contained herein.

It is unrealistic to expect an Authorized Person to warrant that they are “vested” with the authority listed in the Section above. An Authorized Commission will be in a much better position to make such warranty about Authorized Persons under its control. Therefore, that phrase should be deleted from Section 8 of the NDA applicable to Authorized Persons. If such a warranty is deemed to be necessary, it should be included in the Form of Certification applicable to Authorized Commissions.

Section 9

Section 9 addresses “Third Party Beneficiaries.” The ICC recommends that section be modified as follows:

Third Party Beneficiaries. The Parties specifically agree and acknowledge that each ~~PJM~~ Affected Member is an intended third party beneficiary of this Agreement ~~entitled to enforce its provisions.~~

The term “PJM Member” is not defined in this document. Accordingly, the ICC recommends that the reference be changed to “Affected Member.”

C. PJM's Proposed Form of State Certification Requires Modifications to Accommodate the Needs of State Commissions and State Commission Employees

Recitals

The fourth recital paragraph of the Form of Certification document recites a condition that PJM proposes to apply to its agreement to provide confidential information. The ICC recommends that paragraph be modified as follows:

Whereas, PJM agrees to provide Confidential Data to the Authorized Persons, in their capacity as agents of the Authorized Commission, subject to the terms of this Certification, the Non-Disclosure Agreements, and an appropriate Order of the Federal Energy Regulatory Commission ~~protecting the confidentiality of such data~~ approving the changes to the Operating Agreement, approving the Non-Disclosure Agreement form and this Agreement form;

As argued above in response to PJM's proposed Section 18.17.4(a)(ii) addition to the Operating Agreement and Section 2.2 of PJM's proposed Non-Disclosure Agreement, it would be inappropriate for State Commissions to make themselves subject to the jurisdiction of the Commission. For the reasons explained there, the Commission should direct PJM to modify this paragraph of the Recitals as proposed by the ICC above.

Section 2.c

Section 2.c establishes the authority that has been given to an Authorized Person by an Authorized Commission. The ICC recommends that section be modified as follows:

The Authorized Persons have, through all necessary action of the State Commission, ~~been appointed and directed~~ granted authority by the State Commission to execute and deliver the Non-Disclosure Agreements to PJM and receive Confidential Data on the State Commission's behalf and for its benefit.

Except for this paragraph, nothing in the documents filed by PJM on April 29, 2004 envisions requiring an Authorized Commission to specifically “appoint and direct” Authorized Persons. It should be sufficient for the Authorized Commission to attest that the Authorized Persons under its control have been granted the authority to engage in the actions listed in paragraph 2.c. The modifications proposed by the ICC above would make this point clear.

Section 2.d

Proposed Section 2.d would improperly impose several duties on an Authorized Commission to inform PJM. The ICC recommends that section be deleted. In the alternative, if the Commission chooses to retain this section, the ICC recommends that it be modified as follows:

The Commission will, at all times after the provision of Confidential Data to the Authorized Persons, provide PJM with: ~~(i) prompt~~ written notice of any changes in the Authorized Persons’ ~~employment or retention, affecting any Authorized Person’s~~ qualification as an Authorized Person ~~within two (2) business days of such change;~~ (ii) ~~prompt~~ written confirmation to any inquiry by PJM regarding the status or identification of any specific Authorized Person ~~within two (2) business days of such request;~~ and (iii) ~~periodic written updates, no less often than semi-annually, containing the names of all Authorized Persons appointed by the Commission.~~

First, as discussed above, it is an unnecessary and improper burden on the state commissions to require them to disclose confidential personnel information to PJM. The ICC’s proposed alternative language indicated above accomplishes the same purpose of notifying PJM of a change in status of whether an individual is an “Authorized Person” representing a particular state commission. This alternative approach would more clearly convey the actual relevant information sought. The ICC believes that anything beyond simple notification of a change in “Authorized Person” status would violate sound public policy.

Second, the proposed time frames for Authorized Commissions to provide the notices in this paragraph are unreasonably short. PJM has demonstrated no reason to impose such tight time frames. Accordingly, the ICC recommends that PJM's proposed time frames be deleted and replaced with an obligation on Authorized Commissions to promptly respond.

Section 3.a

Section 3.a requires an Authorized Commission to have adequate procedures in place to protect confidential information and to review those procedures. The ICC recommends that section be modified as follows:

~~The State Commission has adequate internal procedures, to protect against the release of any Confidential Data by the Authorized Persons or other employee or agent of the State Commission, and the State Commission and the Authorized Persons will strictly enforce and periodically review all such procedures. In the event that PJM terminates an Agreement with an Authorized Person, and does not restore such individual's status as an Authorized Person, then the State Commission shall review such internal procedures.~~

First, it is improper for this section to attempt to impose a duty on Authorized Persons to review the Authorized Commission's procedures for ensuring data confidentiality. That kind of obligation should not be placed on an Authorized Person in any event and it, most definitely, should not be place on an Authorized Person in a document proposed to be entered into by PJM with an Authorized Commission.

Second, requiring Authorized Commissions to periodically review their data confidentiality procedures would be burdensome and unnecessary. Finally, as the ICC explained above in response to PJM's proposed Section 18.17.4(d)(ii) addition to the Operating Agreement and Section 4.1 of the Non-Disclosure Agreement, it would not be appropriate, under any circumstances, for PJM to unilaterally terminate an Authorized Person's access to PJM data.

Only the State Commission can do that. Consequently, there would not be any occasion for PJM to have the option to unilaterally restore an Authorized Person's access to PJM information. Accordingly, the last sentence of Section 3.a of the proposed Form of Certification should be deleted.

Section 3.b

Section 3.b describes the manner in which an Authorized Commission is to keep PJM information confidential. The ICC recommends that section be modified as follows:

The State Commission has legal authority to protect the confidentiality of Confidential Data from public release ~~or disclosure and/or from release or disclosure to any other person or entity~~, either by the State Commission or the Authorized Persons, as agents of the State Commission.

It is unrealistic to expect any State Commission to be in a position to certify that it has sufficient "legal authority" to prevent, without exception, any release of information to any person. Under state statutes, State commissions do not operate in a vacuum. Rather, each one possesses varying degrees of independence and all must fit within the framework of state government. In the ICC's case, a commitment can be provided to PJM that its confidential information will not be released **to the public**. However, the ICC simply is not in a position to promise that it will never be required to pass on to fellow Illinois state entities information that it has received from PJM. As discussed above, the state has statutory and regulatory provisions protecting confidential treatment of certain documents.¹⁸ However, the state also has a statutory

¹⁸ The Commission's Rules of Practice contain a related provision addressing the matter of confidential and proprietary information. Section 200.430, on protective orders, allows the Commission to enter an order to protect the confidential nature of information received by the Commission. Although the normal time limit for confidential treatment is two years, and generally may not exceed five years, periods longer than five years may be allowed "upon a showing of good cause," as section 200.430(b) provides.

obligation to comply with FOIA requests.¹⁹ In certain circumstances, it will be the courts, not the state commission, that determines whether the information is released. It is unreasonable for PJM to propose language in the Operating Agreement that imposes a burden on the state commissions that is outside of its control or would require it to violate state law. Therefore, the ICC urges the Commission to recognize that reality, and direct PJM to make the modifications proposed above.

Section 3.c

Section 3.c imposes a condition on Authorized Commissions concerning access to confidential PJM information. The ICC recommends that section be modified as follows:

The State Commission shall ensure that Confidential Data ~~and~~ shall be maintained by, and accessible only to, the Authorized Persons and administrative staff.

As a practical matter, State Commission administrative staff may manage the storage of information received from PJM. An exception for this practical reality should be made without requiring all State Commission administrative staff to go through the tedious process of being designated Authorized Persons.

Section 4

Section 4 obligates an Authorized Commission to defend against third party requests for disclosure. The ICC recommends that section be modified as follows:

The State Commission shall ~~defend against, and will direct the Authorized Persons to defend against, against disclosure of any Confidential Data pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders. The State Commission shall~~ provide PJM with prompt notice of any ~~such~~ Third Party Request or legal

¹⁹ Illinois Freedom of Information Act, 5 ILCS 140/1 through 11.

proceedings, and shall ~~consult~~ cooperate with PJM ~~and/or any Affected Member in its efforts to deny the request or defend against such legal process in this regard.~~ In the event a protective order or other remedy is denied, the Commission agrees to furnish only that portion of the Confidential Data which ~~their legal counsel advises PJM (and of which PJM shall, in turn, advise any Affected Member) in writing~~ is legally required to be furnished, and to exercise their best efforts to obtain assurance that confidential treatment will be accorded to such Confidential Data.

First, imposing on State Commissions the obligation to defend against requests for disclosure of PJM information is to misplace the burden. That responsibility rightfully rests with PJM and an obligation should be placed on the State Commission to notify PJM when the State Commission receives a request for disclosure or when the State Commission actually makes a disclosure. The ICC's proposed modification to Section 4 above incorporates this obligation to give notice.

Second, imposing an obligation to "cooperate" is much more consistent with normal state commission obligations than is imposing an obligation to "consult." The ICC recommends that the Commission direct PJM to make this change. Finally, it would not be appropriate to impose this obligation to cooperate on State Commissions' relationship with Affected Members. Accordingly, the ICC recommends that reference to "Affected Members" be deleted from Section 4 as proposed above.

Section 5.a

Section 5.a would control the manner in which the Authorized Commission could use information obtained from PJM. The ICC recommends that section be modified as follows:

The Commission shall use, and allow the use of, the Confidential Data solely for the purpose of discharging its legal ~~responsibility~~ responsibilities to monitor the wholesale and retail electricity markets, operations, transmission planning and siting and generation planning and siting materially affecting retail customers within their respective State, and for no other purpose.

The language in subsection a. represents an improper infringement of the state commission's responsibilities. FERC codification of this infringement through approval of PJM's proposal would constitute significant error. Accordingly, the Commission should direct PJM to modify Section 5.a as proposed by the ICC above.

Section 5.b

Section 5.b sets forth procedures for the return of confidential information back to PJM. The ICC recommends that section be modified as follows:

Upon completion of the ~~inquiry or investigation referred to in any Information Request initiated by or on behalf of the State Commission's~~ need for the information, or for any reason any Authorized Person is, or will no longer be an Authorized Person, the Commission will ensure that such Authorized Person either (a) returns the Confidential Data and all copies thereof to PJM, or (b) provides a ~~certification~~notice that the Authorized Person and/or the Commission has destroyed all paper copies and deleted all electronic copies of the Confidential Data.

As noted above in the ICC's discussion of Section 2.5.5 of the NDA, an Authorized Commission should be permitted to make information requests for whatever purposes it deems appropriate and not be limited to making an information request only for an identified inquiry or investigation. Accordingly, the identified language should be deleted from the Certification document.

V. CONCLUSION

The ICC's ability to fully satisfy its statutory obligations hinges on access to data and information collected by both PJM and its market monitor in the course of performing their responsibilities. Without access to regional system and regional market data from across the Midwest electric market region (of which Illinois will be a major part), the ICC's ability to

monitor, mitigate and prevent the exercise of market power imposed on Illinois electric consumers and ensure reliable system operations and efficient planning will be hobbled.

Accordingly, the ICC recommends that the Commission accept this Protest and direct PJM to modify PJM's proposed Operating Agreement revisions, Non-Disclosure Agreement form, Certification form as described above.

WHEREFORE, the ICC respectfully requests the relief requested herein, and any and all other appropriate relief.

Respectfully submitted,

/s/ Christine F. Ericson

Christine F. Ericson
Deputy Solicitor General and
Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle St., Suite C-800
Chicago, IL 60601
(312) 814-3706
(312) 793-1556 (fax)
cericson@icc.state.il.us

May 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 26th day of May, 2004.

/s/ Christine F. Ericson

Christine F. Ericson
Deputy Solicitor General and
Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle St.
Suite 800-C
Chicago, IL 60601
(312) 814-3706